

APPENDIX

Supreme Court, U. S.

FILED

DEC 4 1978

MICHAEL RUDAK, JR., CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1978

\_\_\_\_\_  
No. 78-38  
\_\_\_\_\_

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,  
*et al.*,

*Petitioners,*

vs.

LEROY FOUST,

*Respondent,*  
\_\_\_\_\_

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE TENTH CIRCUIT

\_\_\_\_\_  
PETITION FOR CERTIORARI FILED JULY 5, 1978  
CERTIORARI GRANTED OCTOBER 10, 1978  
\_\_\_\_\_



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### DOCKET ENTRIES

DATE	PROCEEDINGS
1974	
April 19	<p>Complaint with jury demand, filed.</p> <p>Motion for appointment of U.S. Marshal, No. Dist. of Illinois, as special process server upon International Brotherhood of Electrical Workers &amp; Frank T. Gladney, filed.</p> <p>Motion for appointment of Sheriff of Carbon Co., Wyo. as special process server upon deft. D. F. Jones, filed.</p> <p>Motion for appointment of Sheriff of Douglas Co., Neb. as special process server upon deft. Leo Wisniski, filed.</p>
22	<p>Order appointing U.S. Marshal, No. Dist. of Illinois, as special process server for service upon deft. International Brotherhood of Electrical Workers &amp; deft. Frank T. Gladney, International Vice President, filed.</p> <p>Order appointing Sheriff of Carbon Co., Wyo. as special process server upon deft. D. F. Jones, filed.</p> <p>Order appointing Sheriff of Douglas Co., Neb. as special process server upon deft. Leo Wisniski, filed.</p> <p>Appearance of Urbigkit, Moriarity, Halle &amp; Mackey as attorneys for plaintiff, filed.</p>
May 16	<p>Summons with Marshal's return of service upon deft. Gladney on 5-9-74, filed.</p> <p>Summons with Marshal's return of service upon deft. Int'l Brotherhood of Electrical Workers on 5-9-74, filed.</p>

DATE	PROCEEDINGS
1974	
June 13	Appearance of Lathrop, Uchner & Mullikin as attorneys for defendants, filed. Answer of defendants, filed.
26	Appearance of Mulholland, Hickey & Lyman as attorneys for defts., filed.
Oct. 2	Notice setting jury trial for May 27, 1975 at 9:30 a.m., filed, copies to counsel.
16	Notice of deft. International Brotherhood of Electrical Workers to take deposition of pltf. Leroy Foust on Oct. 24, 1974, filed.
Nov. 19	Deposition of Leroy Don Foust taken by defendants on October 24, 1974 filed.
1975	
Jan. 24	Order setting pre-trial conference for March 3, 1975 at 10:30 a.m., filed, copies to counsel.
Feb. 24	Response of defts. to pre-trial order, filed.
Mar. 3	Plaintiff's pre-trial submission, filed. Pre-trial conference held this date. Order on pretrial conference filed, copies to counsel.
7	Motion of pltf. to amend the complaint, filed. Order granting motion to amend complaint by alleging that Dean F. Jones is a citizen of the State of Oregon, filed, copies to counsel.
26	Amended complaint, filed.
Apr. 23	Defendant's first interrogatories to pltf., filed.
May 5	Motion of defts. to dismiss or in the alternative for summary judgment, filed. (Memorandum and affidavit attached)

DATE	PROCEEDINGS
1975	
May 5	Notice striking trial setting and setting hearing on motion for summary judgment in lieu thereof on May 27, 1975 at 9:30 a.m., filed, copies to counsel.
22	Plaintiff's answers to defendants First Interrogatories, filed. Affidavits of pltf. and Edward P. Moriarity in opposition to motion to dismiss or in the alternative for summary judgment, filed.
27	Pltf's memorandum in opposition to the deft's motion to dismiss or in the alternative for summary judgment, filed. Hearing held this date on motion to dismiss or for summary judgment. Motion taken under advisement.
30	Notice of pltf. of taking deposition of Dr. Robert W. Taylor, filed.
June 9	Statement in lieu of deft's argument in rebuttal, filed.
17	Memorandum Opinion, filed. Order overruling motion to dismiss or in the alternative for summary judgment, filed, copies to counsel.
July 11	Deposition of Robert Walker Taylor, M.D., taken on behalf of the plaintiff, filed.
Sept. 15	Notice of pltf. of the taking of the deposition of D. F. Jones, filed.
Oct. 21	Notice setting jury trial for 4-8-75 at 9:30 at Cheyenne before Brimmer, filed, copies to counsel. (on 10-22-75)



DATE	PROCEEDINGS
1975	
Nov. 3	Notice of pltf. of taking depositions of Leo Wisniski, filed.
Dec. 2	Deposition upon oral examination of Dean F. Jones, filed.
1976	
Mar. 24	Defendants second interrogatories to pltf., filed. Deposition of Leo Wisniski, taken on behalf of pltf., filed.
25	Notice resetting jury trial for 9:30 a.m., May 13, 1976 in Cheyenne, before Judge Brimmer, in court room 2, filed, copies to counsel.
Apr. 9	Plaintiff's answers to defts' second interrogatories, filed.
28	Amendment to pltf's answers to defts' second interrogatories, filed.
May 3	Pltf. precipe for subpoena, filed, and subpoena and copy issued.
10	Motion of defts. to deny jury trial, with memorandum attached, filed.
13	Trial to Court and Jury commenced and continued to 5-14-76 at 9 a.m. Courtroom minute sheet filed.
14	Trial to Court and jury resumed and jury returns verdict for pltf. Courtroom minute sheet filed. Verdict filed, Clerk to enter Judgment on the verdict.

DATE	PROCEEDINGS
1976	
May 17	Judgment on jury verdict that pltf. recover of and from defts. the sum of \$115,000, constituting the jury award of \$40,000 actual or compensatory damages and \$75,000 punitive or exemplary damages, pltf. to have his costs, ent. & filed, copies to counsel. Instructions, filed.
25	Deft.'s motion for judgment notwithstanding the verdict and alternative motion for new trial, filed.
June 23	Certificate of costs, filed by pltf.
Jul. 1	Bill of pltf's costs issued and filed and copies to counsel.
7	Notice setting hearing on motion for judgment notwithstanding the verdict and alternative motion for new trial for 9:00 a.m., 7-14-76, at Cheyenne before Judge Brimmer, filed. Cys. to counsel.
14	Hearing on motions for judgment notwithstanding verdict, new trial, and new trial on punitive damages or remittur—all motions under advisement. Court to prepare Order. Courtroom minute sheet filed.
23	Order denying defts' motions for judgment notwithstanding the verdict or in the alternative for a new trial, filed, copies to counsel.
Aug. 19	Notice of appeal filed by defts., and copies mailed by Clerk on 8-20-76 to Attorneys Urbigkit, Mackey & Whitehead; Lathrop, Uchner & Mullikin; and Mulholland, Hickey & Lyman, and to Clerk, U.S. Court of Appeals, Tenth Circuit. Bond for costs on appeal (\$250.00 cash), filed.

DATE	PROCEEDINGS
1976	
Sept. 15	Letter dated 9-13-76 from appellant in the nature of a designation of record on appeal, filed.
16	Letter dated 9-13-76 from appellant in the nature of a supplemental designation of record on appeal, filed.
23	Motion for extension of time for preparation of transcript and transmission of record on appeal, filed.  Order extending time to Nov. 2, 1976 for preparation of transcript and transmission of record on appeal, filed, copies to counsel and Clerk, USCA.
Oct. 20	Notice that case docketed in U.S. Court of Appeals on 10-19-76 and given No. 76-1951, filed.  Reporter's transcript of trial proceedings (2 volumes), filed.
20	Receipt for exhibits and transcripts, filed.
28	Motion for leave to withdraw as counsel for defts., filed.  Order allowing Lathrop, Uchner & Mullikin to withdraw as counsel for defts., filed, copies to counsel, and Clerk, U.S.C.A.
Nov. 2	Original record on appeal, in five volumes, forwarded to the Clerk, USCA, 10th Circuit, Denver, CO.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF WYOMING

No. C 74-50

\_\_\_\_\_  
LEROY FOUST,  
*Plaintiff,*

—vs—

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS;  
D. F. JONES, District Chairman in his Representative Capacity; LEO WISINSKI, General Chairman in his representative capacity; and FRANK T. GLADNEY, International Vice President in his representative capacity,  
*Defendants.*

AMENDED COMPLAINT

Plaintiff hereby amends his complaint as follows:

For his cause of action, plaintiff complains of defendants as follows:

1. The plaintiff, LeRoy Foust, is a citizen of the State of Wyoming; the defendant, International Brotherhood of Electrical Workers is a corporation with head offices in Rosemont, Illinois; the defendant, D. F. Jones, is a citizen of the State of Oregon; the defendant, Leo Wisinski, is a citizen of the State of Nebraska; the defendant, Frank T. Gladney, is a citizen of the State of Illinois; and the amount in controversy, exclusive of costs, exceeds the sum of \$10,000;

2. LeRoy D. Foust was an employee of the Union Pacific Railroad for approximately 20 years; was a member of International Brotherhood of Electrical

Workers since 1956 and is presently an inactive member of said Union; that due to injury and resulting surgery in September, 1970, he was unable to work and, by a letter dated February 3, 1971 (Exhibit A), was discharged from his employment with the Union Pacific Railroad. Said letter was received by plaintiff on February 5, 1971;

3. D. F. Jones was District Chairman of the International Brotherhood of Electrical Workers, and Leo Wisinski was General Chairman of said Union at all times pertinent thereto, and Frank T. Gladney was International Vice President of IBEW at all times pertinent hereto;

4. After receiving Exhibit A, plaintiff contacted representatives of the Union Pacific Railroad and asked them to reconsider and let plaintiff know if the dismissal was final. The Union Pacific Railroad did not reply to such request and plaintiff was required by Union contract to pursue his allegations of wrongful discharge through the Union;

5. The Union Pacific Railroad and System Federation No. 105, IBEW, had entered into an agreement dated April 1, 1957 that dealt with the grievance procedure required to be followed to handle disputes of this nature. Rule 21 of said Agreement requires that notice be given of a grievance within 60 days of the date the grievance occurred;

6. On March 26, 1971, a certified letter was sent to D. F. Jones, District Chairman, IBEW, on behalf of the plaintiff, with a carbon copy to Mr. Wisinski and the International IBEW, requesting that proper, timely, and adequate representation of his grievance be pursued by the IBEW and its representatives. Said letter to D. F. Jones was received on March 27, 1971;

7. On April 5, 1971, a letter to Mr. Foust was sent by Mr. Jones informing plaintiff that he personally must request the assistance noted in Paragraph 6 above. On April 6, 1971, after further discussion of this matter by representatives of the plaintiff and Mr. Wisinski, the grievance was filed;

8. The grievance was pursued before the National Railroad Adjustment Board, Second Division, and on June 2, 1972 an award was made denying the claim of the plaintiff on the ground that a timely grievance was not filed pursuant to Rule 21(1) of the Agreement referred to in Paragraph 5 above;

9. The above-named defendants breached the contract between the IBEW and plaintiff that required the IBEW to fairly represent the plaintiff and other Union members in pursuit of a grievance;

10. The above-named defendants were guilty of gross non-feasance and hostile discrimination in arbitrarily and capriciously refusing to process the plaintiff's grievance and refusing to timely file said grievance as required by the contract;

11. As a proximate result of the defendants' non-feasance and hostile discrimination, breach of contract and breach of duty of fair representation, the plaintiff was damaged in that he was barred from pursuing his grievance which would have enabled him to return to work with the Union Pacific Railroad from February 5, 1971 and in that he incurred great mental strain, anguish, pain and suffering, legal expenses, all to his damage in the amount of Seventy Five Thousand Dollars (\$75,000).

WHEREFORE, plaintiff prays for a judgment against defendants, jointly and severally, for damages in the amount of Seventy Five Thousand Dollars (\$75,000) and punitive damages in the additional amount of Seventy

Five Thousand Dollars (\$75,000), for a total judgment amount of One Hundred Fifty Thousand Dollars (\$150,000).

LEROY D. FOUST

By /s/ [Illegible]  
OF URBIGKIT, MORIARITY, HALLE &  
MACKEY, P.C.  
502 Cheyenne National Bank Tower  
P.O. Box 247  
Cheyenne, WY 82001  
His Attorneys

#### CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 25 day of March, 1975, he caused full, true and correct copies of the foregoing amended complaint to be served, by mailing said copies thereof in sealed envelopes with proper postage attached thereto, and depositing same in the United States Post Office at Cheyenne, Wyoming, addressed as follows:

Mr. David D. Uchner  
Lathrop, Uchner & Mullikin, P.C.  
400 American National Bank Building  
Cheyenne, WY 82001

Mr. William J. Hickey  
Mulholland, Hickey & Lyman  
1125 - 15 Street, N.W.  
Washington, D.C. 20005

/s/ [Illegible]

#### IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

No. C 74-50

LEROY FOUST,  
*Plaintiff,*  
—vs—

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS;  
D. F. JONES, District Chairman in his Representative Capacity; LEO WISINSKI, General Chairman in his representative capacity; and FRANK T. GLADNEY, International Vice President in his representative capacity,  
*Defendants.*

#### ORDER OVERRULING MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

The above-entitled matter coming on regularly for hearing before the Court upon defendants' Motion to Dismiss or in the Alternative for Summary Judgment, and the Court having heard the arguments of counsel in support of said motion and in opposition thereto, took said matter under advisement, and having prepared and filed herein its Memorandum Opinion, and being fully advised in the premises; NOW THEREFORE IT IS

ORDERED that said Motion to Dismiss or in the Alternative for Summary Judgment be, and the same is hereby, overruled.

Dated this 17th day of June, 1975.

/s/ Ewing T. Kerr  
Judge



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF WYOMING

No. C 74-50

\_\_\_\_\_  
LEROY FOUST,  
*Plaintiff,*

—vs—

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS;  
D. F. JONES, District Chairman in his Representative  
Capacity; LEO WISINSKI, General Chairman in his  
representative capacity; and FRANK T. GLADNEY, In-  
ternational Vice President in his representative capacity,  
*Defendants.*

\_\_\_\_\_  
Walter C. Urbigkit, Jr. and Terry W. Mackey of the  
firm of Urbigkit, Moriarity, Halle & Mackey, P.C., Chey-  
enne, Wyoming, appearing as counsel for plaintiff.

William J. Hickey, Jr., of the firm of Mulholland,  
Hickey & Lyman, Washington, D. C., appearing as coun-  
sel for defendants.

MEMORANDUM OPINION

KERR, District Judge

Decided June 17, 1975.

Plaintiff Leroy Foust has brought this action against defendant union and some of its officials. Plaintiff alleges that defendants failed to properly and fairly represent him when he filed a grievance alleging wrongful discharge by his former employer, who is not a party to this action. Plaintiff generally alleges that defendants failed to

properly pursue his wrongful discharge grievance in a timely fashion resulting in dismissal of the grievance by the Railroad Adjustment Board on the basis that more than sixty (60) days had expired since the date of the occurrence upon which the grievance was based. Defendants have moved for summary judgment and have filed supporting affidavits. Plaintiff has filed affidavits in opposition to the motion, together with his objections thereto.

This Court has previously noted that summary judgment is a "drastic remedy" and that the Court should proceed with caution. See *Keller v. California Liquid Gas Corporation*, 363 F.Supp. 123 (D.C. Wyo. 1973). It is not to be granted where there exists a genuine issue as to a material fact. See *Ando v. Great Western Sugar Company*, 475 F.2d 531 (10th Cir. 1973). As stated by Judge Barrett, "it is not properly awarded when an issue turns on credibility." See *Redhouse v. Quality Ford Sales, Inc.*, 511 F.2d 230, 234 (10th Cir. 1975), quoting from *Eagle v. Louisiana and Southern Life Insurance Company*, 464 F.2d 607 (10th Cir. 1972). Summary judgment does not serve as a substitute for trial, nor can it be employed so as to require parties to litigate via affidavits. See *Jones v. Nelson*, 484 F.2d 1165 (10th Cir. 1973). Pleadings, therefore, must be liberally construed in favor of the party opposing summary judgment. *Smoot v. Chicago, Rock Island and Pacific Railroad Company*, 378 F.2d 879 (10th Cir. 1967).

Without unduly delving into the merits, it does not appear that this is a case where the union exercised its discretion in failing or refusing to file a grievance, see *Crawford v. Pittsburgh-Des Moines Steel Co.*, 386 F.Supp. 290 (D.C. Wyo. 1974), inasmuch as the contention is that the union failed to timely file, to the prejudice of plaintiff. The correspondence submitted as exhibits is voluminous and is contradictory or at least subject to

differing interpretations. Thus, the credibility and intent of the authors would be very much in issue. Further, the affidavits are strikingly disparate in their statements of the facts. In such a situation, the affidavits serve to create genuine issues rather than dispose of them. Further, the defendants rely heavily on a settlement previously reached with the employer as absolving them of any liability, whereas plaintiff heatedly disputes that the release in the prior action was intended to cover or be applicable to any claim against the union. Intent would here be crucial in determining the scope of that release. Thus, it is clear that genuine issues as to material facts exist, and an order overruling the Motion to Dismiss or in the Alternative for Summary Judgment will be entered.

FOR THE DISTRICT OF WYOMING

No. C 74-50

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C74-50B

LEROY FOUST,

—vs—

*Plaintiff,*

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS;  
D. F. JONES, District Chairman in his Representative Capacity; LEO WISINSKI, General Chairman in his representative capacity; and FRANK T. GLADNEY, International Vice President in his representative capacity,  
*Defendants.*

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Volume I of II

May 13, 1976

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TRANSCRIPT OF TRIAL PROCEEDINGS

Transcript of Trial Proceedings on the above-entitled matter before the Honorable Clarence A. Brimmer, Judge, and a jury of six, Cheyenne, Wyoming, commencing on the 13th day of May, 1976.

APPEARANCES

For the Plaintiff:

URBIGKIT, MACKEY & WHITEHEAD  
Attorneys at Law  
17th and Carey  
Cheyenne, Wyoming 82001  
By Mr. TERRY W. MACKEY



For the Defendants:

LATHROP, UCHNER & MULLIKIN<sup>1</sup>  
Attorneys at Law  
American National Bank Building  
Cheyenne, Wyoming 82001  
By Mr. DAVID D. UCHNER

[2] MULHOLLAND, HICKEY & LYMAN  
Attorneys at Law  
Suite 400,  
1125 15th Street, N.W.  
Washington, D.C. 20005  
By Mr. WILLIAM J. HICKEY

. . . .

[30] LEROY D. FOUST,

called as a witness on behalf of the Plaintiff, being first  
duly sworn, testified as follows:

# DIRECT EXAMINATION

BY MR. MACKEY:

Q. Would you state your full name, please?

A. LeRoy D. Foust.

. . . .

[39] Q. All right. Did there come a time when you  
sought a third leave of absence?

A. Yes.

Q. When was that, Mr. Foust?

A. Well, the leave of absence ended on the 22nd and  
I had contacted a fellow employee down at the railroad  
to bring me a leave of absence.

Q. Who was that fellow employee?

A. This was Glen Harwick. He was a District Line-  
man that worked at Cheyenne, also out of Cheyenne, with  
the district he took care of.

Q. Was he a friend of yours?

A. Yes.

Q. Go ahead and tell the jury how you obtained that  
third leave of absence form.

A. Well, at this particular time weather and every-  
thing was bothering me, so I asked him if he would drop  
the forms by me so I could get another leave of absence.  
I did this at least a week in advance and he didn't show  
up.

So I finally called him again and he said he was real  
busy and he forgot this and he would get them. On the  
23rd of December he brought them out to me.

And at this particular time before coming to Cheyenne  
he was district man up at Gering and he had these forms

that was of an older type. And I wasn't sure that—[40] at different times we got criticized for using the older forms. We were supposed to use the newer forms.

I told him, "Old branch lineman, you are going to have to get a little more modern."

He said he would run back to the shop there where he had a supply of these and then he returned with the leave of absence form.

I filled this out and he took it and they put it in a Thousand Miler envelope. These envelopes were what the railroad use, and the last address, you cross it out and write another one in. So every time you sent one of these envelopes, it was the possibility it would go more than a Thousand Miler. This is where I think they got the nickname of Thousand Miler envelope.

Q. Did you put that in the envelope?

A. Yes.

Q. Did you sign that form?

A. Yes.

Q. That was when?

A. On the 23rd.

Q. Had your leave of absence expired prior to that time, your former leave of absence?

A. It ended on the 22nd of December.

Q. All right. And did you ever make further inquiry about that?

[41] A. Yes. When I filled this out, I'd just seen the doctor prior to this and talked to him about going to work again and he was saying, "Well, maybe in about six months we will see how you are doing."

I filled out this leave of absence and I was thinking, "Six months is what the doctor said." And I said, "I could beat him a month."

I put in five months. There are two places you insert time. One place I put six months, the other place I put five months.

It didn't dawn on me until after Glen had left with the thing and everything. I could get hold of him at the depot. I guess he was out on a trouble call or something.

And the next day I called him and asked him if he had mailed this yet and he said he hadn't. He apologized to me and said he got called out on this trouble and he would do it right away.

I said there was one thing I wanted him to do and I explained to him in one place I put six months and the other place put five months. And I asked him to correct both of them to coincide, I believe, to five months. And he said he would do this and mail it for me. This was right before Christmas.

So then I got to thinking that maybe if he got busy again this might have happened so I called him on the [42] telephone after Christmas and asked him if he had done this and he said, "Yes," and he and D. C. Martin down at communications, he was the manager of the office, had done this, and put it in an envelope. He didn't say whether a Thousand Miler or regular envelope. And then put it in a Omaha box where all Omaha mail goes into the one box, goes into a pouch and then into a mailing system. That goes directly to Omaha.

Q. Did he tell you how long after the 23rd it had been mailed?

A. No. At that particular time he didn't say the exact date or anything like this, just that he and D. C. Martin had done this and seen it got in the Omaha box in the pouch.

Q. All right. Did there come a time when you heard further from anyone in regard to that leave of absence request?

A. Yes. From Omaha, that my leave of absence was not in and everything like this. And I had obtained attorneys to help me in my affairs and matters and everything and I took this down to my attorney which was Mr. Moriarity and I explained to him what I had done with

this leave of absence and everything else like that and I could not understand why they had not received this.

Q. Now you mentioned that Mr. Moriarity was your attorney. Had you retained an attorney for any reason in regard to your injury or employment with Union Pacific?

[43] A. Well, yes. Basically after I took my myelogram, I run into all kinds of difficulties and I couldn't handle my affairs. And it was really taxing my wife and everything like this. She couldn't help me much. So I obtained an attorney. I told him to contact Mr. Jones, the District Chairman there, that he was representing me and everything like this as he did and also to contact the railroad, Mr. Wolters, Claim Agent there that he was my representative.

Q. All right. Mr. Foust, you mentioned that you ultimately received correspondence from the Union Pacific Railroad.

I hand you what was received into evidence at the Pre-Trial Conference as Defendants' Exhibit A and ask you if that is the correspondence you received?

A. Yes, this is it.

"Dear Mr. Foust:

[44] "Your present leave of absence dated September 22, 1970, expired December 22, 1970.

"We have heard nothing from you and it is necessary that we promptly receive proper request for leave of absence accompanied by a statement from the doctor as to the necessity for the leave, including the approximate date that you may be expected to return to your position as radio man.

"Yours truly," and it is stamped R. B. J.

Q. Do you know what that stamp R. B. J. means?

A. Yes. This is Chief Clerk, Ralph Jetson.

Q. Now as a result of that letter of January 12, 1971, did you take any action?

A. Yes. When I talked to my attorney, Mr. Moriarity, I told him while I was in the hospital I told Dr. Taylor he was supposed to get in a letter, how ever they did it, that I was in the hospital.

Q. Did you instruct your attorney to take any action?

A. I asked him, I said, would he write a letter for me to Omaha to find out what they wanted and that I had sent in a leave of absence request and couldn't understand what was necessary.

Q. Mr. Foust, I show you what was received into evidence at the Pre-Trial Conference as Defendants' Exhibit B [45] and would ask if that is the letter you instructed Mr. Moriarity to write?

A. Yes.

\* \* \*

A. This is a letter to Mr. C. O. Jett, Superintendent of Communications, Union Pacific Railroad Company, Transportation Division, 1416 Dodge Street, Omaha, Nebraska. Reference to LeRoy D. Foust.

"Dear Mr. Jett:

"Our law firm has been retained to represent the above-named Mr. Foust in regards to recovery for injuries he sustained on March 9, 1970.

"We are in receipt of your letter dated January 12, 1971, which you sent to Mr. Foust by registered mail return receipt requested. In the letter you stated that it was necessary that you promptly receive a proper request for a leave of absence accompanied by a statement from the doctor as to the necessity for the leave.

"Enclosed is a photocopy of Union Pacific Railroad Company Form 153, Request for Leave of Absence. [46] This form was filled out by Mr. Foust requesting the five-month medical absence from December 23, 1970, through May 23, 1971, for the reason of the personal injury he sustained on March 9, 1970, and by order of Dr. Taylor. The original of this form was deposited in the U. P. mail, the Omaha pouch, in December of 1970.



"It would be appreciated if you would please inform us if the original of Form 153, described above, has been received by your office. If not, please notify this office as to what form or forms that will be necessary for Mr. Foust to file in order to receive the requested medical leave of absence.

"Very truly yours, Edward P. Moriarity."

\* \* \*

"Dear Mr. Moriarity:

[47] "Reference your letter January 21, 1971, which we are answering as a matter of courtesy as Mr. L. D. Foust, Radio Man, has not advised this office of granting"—I think is it legal position?

Q. Granting him permission.

A. Oh.

"granting him permission for anyone to represent him.

"On January 4, 1971, we did receive from Mr. Foust Form 153, Request for Leave of Absence, dated December 23, 1970. However, it is necessary that we receive a statement from a physician as to the nature of the injuries and when it is expected he will be able to return to work in order to support his request for leave account medical reasons.

"When a statement from a doctor is received, the request for leave of absence will be given consideration."

Q. Now, Mr. Foust, in relation to your requested leave of absence, had you discussed that with the doctor?

A. Yes.

Q. What did you understand the doctor was doing in relation to it?

A. I thought all these forms had been taken care of so I automatically, after receiving this other letter they wanted a medical, I went to his office and told his office [48] girl that I was going to have to have a letter that they present to verify that I needed a medical leave of absence.

Q. And who prepared or who actually prepared a letter for you in that regard?

A. Well, they was done by his office help and then signed by Dr. Taylor as to substantiate my medical leave of absence that I was supposed to be on.

Q. Who told you you could not go back to work?

A. He had never released me. I had never at this point reached a point of release.

Q. "He" meaning Dr. Taylor?

A. Meaning Dr. Taylor, yes.

Q. How did it come that you came to be Dr. Taylor's patient?

A. Well, he was a second orthopedic specialist and I followed up with him.

Q. You were sent to him by the Union Pacific Railroad?

A. Yes. The hospital association, railroad doctors, sent me over to him.

Q. At the infirmary?

A. Right. They sent me to him.

Q. And did you know whether or not Dr. Taylor provided other forms to the railroad in regard to your medical condition?

A. Well, I didn't know for sure, but I knew that he [49] was supposed to send in, I think, monthly reports about my progress and everything like this.

Q. On your two prior leaves of absence, had you ever specifically requested Dr. Taylor to send anything to the railroad?

A. No.

Q. And both of those leaves of absence were granted?

A. Yes.

Q. Were you ever advised when those were granted that you needed anything further to complete them?

A. No.

\* \* \*

[50] A. This is a letter of February 3, 1971, registered mail, return receipt requested. Mr. L. D. Foust, 1502 Adams, Cheyenne, Wyoming. Copy went to Mr. Leo Wisniski, General Chairman, IBEW, 5636 Spring Street, Omaha, Nebraska.

"On January 12, 1971, we wrote you as follows:

" 'Your present leave of absence dated September 22, 1970, expired December 22, 1970.

" 'We have heard nothing from you and it is necessary that we promptly receive proper request for leave of absence accompanied by a statement from the doctor as to the necessity for the leave, including the approximate date that you may be expected to return to your position as radio man.'

"On January 14, 1971, we received a request for leave of absence dated December 23, 1970, reading: 'I request medical absence of five months from December 23 [51] through May 23, 1971, for the following reason—Personal injury by order of Dr. Taylor.'

"For your failure to furnish a request for leave of absence prior to the expiration of the original leave of absence which expired on December 22, 1970, and failure to furnish a statement from the doctor as to the necessity for additional leave, your services with the Union Pacific Railroad Company are terminated, effective immediately in accordance with the Agreement between the Union Pacific Railroad Company and System Federation No. 105, International Brotherhood of Electrical Workers, dated April 1, 1957, Rule 23(b) :

" 'Failure to report for duty at the expiration of leave of absence shall terminate an employee's service and seniority, unless he presents a reasonable excuse for such failure not later than seven days after expiration of leave of absence.'

"Yours truly, C. O. Jett."

Q. Mr. Foust, did you take any action in regard to that?

A. Yes.

Q. When you received that letter?

A. Yes. I went to my attorney, Mr. Moriarity, and I instructed him to write a letter to find out what they needed and everything like this. I couldn't understand why they [52] were doing this because I had followed all the basic rules and everything like this.

I asked for the medical thing from the doctor, but I can't tell doctors exactly when they are going to do something or anything like this. But the request was made and I assumed everything was taken care of.

\* \* \*

Q. Did you have any conversation after you received that letter with your attorney?

A. Yes.

Q. Did you give him any instructions?

A. Yes. He was to handle it with Mr. Jett and also with my Union.

\* \* \*

[54] A. This is a letter of February 11, 1971.

"Mr. C. O. Jett, Superintendent of Communications, Union Pacific Railroad, Transportation, 1416 Dodge Street, Omaha, Nebraska."

Reference to Mr. LeRoy D. Foust.

"Dear Mr. Jett:

"I am in receipt of a letter which was received by Mr. LeRoy D. Foust from you on February 5, 1971, in which you stated that his services with the Union Pacific Railroad [55] Company were terminated, effective immediately, in accordance with the agreement between the Union Pacific Railroad Company and System Federation No. 105, International Brotherhood of Electrical Workers, dated April 1, Rule 23(b).

"On January 25, 1971, you sent a letter to me in regards to Mr. Foust. In that letter you stated that you were answering as a matter of courtesy since you had not been advised that Mr. Foust had granted his permission for anyone to represent him. On November 19, 1970, in a letter to Mr. W. L. Wolter, Claim Agent for the Union Pacific Railroad Station in Cheyenne, Wyoming, we gave the Union Pacific Railroad formal notice that we were representing Mr. Foust. I fully realize that the Union Pacific Railroad Company is a large organization but they should be efficient enough so that a man of your importance can be informed when an employee is being represented by legal counsel.

"Since we are representing Mr. Foust, whether you like it or not, we hereby make formal protest of the appalling action taken pursuant to your letter of February 3, 1971. It is Mr. Foust's contention that Rule 23(b) is not applicable to his situation. Rule 24 states, 'In case an employee is unavoidably kept from work, he will not be discriminated against.' Mr. Foust is unavoidably kept from work. He received a broken back as a result of his employment with the Union Pacific Railroad, has served faithfully the great U. P. R. R. [56] for twenty years. He has complied with Rule 25 in regards to a personal injury by making all reports that are necessary to the company.

"Even though Mr. Foust earlier protested that he should not be required to file a request for medical absence, he has complied with the request of the Union Pacific. When he went into the hospital in August of 1970 to have his back operated on, he requested Dr. Taylor, a railroad physician, to give the railroad whatever medical information was necessary. Since that time Mr. Foust has filed three requests for medical leave of absence—the first two were fully granted. It was assumed that the Union Pacific had required information from Dr. Taylor at that time.

"Incidentally, Dr. Taylor has given me a full medical report and informed me that he furnished the same information to the Union Pacific Railroad. The Union Pacific is not without proper notice from a doctor.

"In your letter to me on January 25, 1971, you stated that when a statement from the doctor was received, the request for leave of absence would be given consideration. I immediately contacted Dr. Taylor and he, at first, said that he had sent in the form. Then, after checking his records, he found out that he had not submitted the form, but he told me that he would do so through normal railroad channels. He forwarded me a copy of the required information [57] and, as a safety precaution, I sent you a photocopy of what I received.

"It would be appreciated if you would review this file and let us know if the decision to terminate Mr. Foust's employment with the Union Pacific is final. If the action is deemed to be in the best interest of the Union Pacific, irregardless of the substantial amount of public relation advertisement now being used, it surely is not in the best interest of Mr. Foust with his injuries compounded by the necessity to feed, clothe and care for five children.

"Very truly yours, Edward P. Moriarity."

Q. Mr. Foust, do you know whether or not the Union Pacific replied to that?

A. Yes, I believe he did.

Q. What was the reply?

A. That the letter of termination was final.

Q. They would not reconsider their position?

A. No.

Q. As a result of that reply from the Union Pacific Railroad, did you take any action?

A. Yes. I instructed my attorney to contact Mr. Dean Jones, the District Chairman, and to go through the proper channels this way to have this done away with.

Q. What did you want the Union to do?



A. To represent me. This was a gentleman at Rawlins, [58] Wyoming, Mr. Dean Jones, and I instructed my attorney to go through the proper procedure and contact him and everything.

Q. All right. Mr. Foust, I hand you what was received into evidence at the Pre-Trial Conference as Plaintiff's Exhibit No. 14 and ask you if that is the action that was taken as a result of your request?

A. Yes.

Q. What is that?

A. This is a letter dated March 26, 1971, to Mr. D. F. Jones, 514 - 12th Street, Rawlins, Wyoming.

\* \* \*

A. This is in reference to L. D. Foust, Radio Man, LU No. 775, Seniority Date 5-14-62—Social Security No. 508-32-2651.

"Dear Mr. Jones:

[59] "We have been informed that you are the officer of the carrier authorized to receive grievances under Rule 21 of the Agreement between the Union Pacific Railroad and System Federation No. 105, International Brotherhood of Electrical Workers, dated April 1, 1957. If you are not the officer so authorized under Rule 21 would you please, in your official capacity as Union representative of Mr. Foust, please inform us by return mail who is the officer of the carrier authorized to receive grievances and also, please forward on to him this written grievance claim which we are submitting pursuant to Rule 21.

"On February 5, 1971, Mr. L. D. Foust received a letter from Mr. C. O. Jett, a carbon of which was sent to Mr. Leo Wisniski, General Chairman of the IBEW, which terminated Mr. Foust's services with the Union Pacific Railroad. A copy of this letter is attached. It is Mr. Foust's contention that his termination was in clear violation of the Agreement between the Union

Pacific Railroad and the International Brotherhood of Electrical Workers. Mr. Foust has complied with Rule 25 of said Agreement which deals with personal injury. He has filed all papers requested of him by the Union Pacific Railroad. His doctor, Dr. Taylor, has kept the Union Pacific informed as to Mr. Foust's medical progress. Dr. Taylor is a Union Pacific doctor.

"Pursuant to Rule 21 Mr. Foust is making this [60] written report of his grievance claim and hereby requesting the International Brotherhood of Electrical Workers to do everything within their power to enable Mr. Foust to be reinstated as an employee of the Union Pacific Railroad without any loss of wages or loss of seniority. The action of Mr. C. O. Jett was completely arbitrary and capricious, without proper foundation. We will be more than happy to supply you with any and all information we have concerning this incident to assist you in the investigation of this matter.

"A carbon of this letter is being sent to Mr. Wisniski and to the President of the International Brotherhood of Electrical Workers to insure that proper notification is given to the Union pursuant to Rule 21 and also enter an attempt to help to expediate this matter.

"As you are well aware, Mr. Foust filed another claim with you on June 17, 1970, in regards to a Union Agreement violation that came to his knowledge in late May, 1970. According to Rule 21, paragraph 1, all claims not disallowed within sixty days are to be deemed allowed. Mr. Foust to this date has never received any correspondence from you in regard to this claim that he filed on June 17, 1970. You informed him in December by telephone that the Union was not going to do anything in regards to his claim due to the fact that he had retained our law firm to assist [61] him in his personal injury claim against the Union Pacific Railroad. For your knowledge and for the knowledge of Mr. Wisniski, who I understand gave you this information to convey

to Mr. Foust, Mr. Foust did not retain our firm until late November, 1970, long after the sixty-day claim period had expired. We would appreciate some acknowledgment of this claim we are herewith and appreciate any and all support the Union can give Mr. Foust in regards to this matter. As I indicated to you in our letter of January 21, 1971, Mr. Foust is presently and has always been a strong Union man. He looks forward to the Union for security and backing but is becoming very disheartened by the Union's lack of cooperation.

"If I can assist you in any way or if you require any information from Mr. Foust in regards to this claim, please let me know at your early convenience.

"Very truly yours, Edward P. Moriarity." Copy to Mr. Leo Wisniski and Mr. Pillard.

\* \* \*

[62] Q. (By Mr. Mackey) Mr. Foust, are you familiar with a Union rule or a contract agreement between the IBEW and Union Pacific Railroad known as Rule 21?

A. Yes.

\* \* \*

[63] A. "Rule 21. Discipline and grievances.

"(a) All claims or grievances arising on or after January 1, 1955, shall be handled as follows:

"(1) All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the carrier authorized to receive same, within sixty days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the carrier shall, within sixty days from the date same is filed, notify whoever filed the claim or grievance (the employee or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a prece-

dent or waiver of the contentions of the carrier as to other similar claims or grievances."

\* \* \*

[66] A. "Rawlins, Wyoming, April 5, 1971.

"Dear Mr."—there is no "Dear" there.

"Mr. L. D. Foust, 1502 Adams Avenue, Cheyenne, Wyoming.

"Dear Mr. Foust:

"This with reference to letter of March 26, 1971, received from attorney Edward P. Moriarity relative to grievance in your behalf.

"It is proper procedure for the employee to make his claim or grievance known in writing to the District Chairman for consideration for handling with the carrier in accordance with provisions of the Agreement. As you are very well aware, Rule 21 provides that all claims or grievances must be presented in writing by or on behalf of the employee involved, that is why it is necessary to receive in writing authority to handle claims or grievances for further handling.

"Upon receipt of your grievance in writing, and request to the undersigned to handle your initial claim pertaining to the carrier terminating your service, it will be reviewed and handled under the proper grievance procedures of the current Agreement.

"Yours truly, D. F. Jones, District Chairman."

\* \* \*

[67] Q. Mr. Foust, I hand you what has been received into evidence at the Pre-Trial Conference as Defendants' Exhibit Y and ask you if that tells what the end result of your grievance was?

A. Yes, it does.

\* \* \*

[68] Q. Would you go ahead, Mr. Foust, and read to the jury what the text of that award is?

A. "Dispute: Claim of Employees:

"1. That Radio Man L. D. Foust was unjustly treated and the provisions of the current Agreement were violated when he was dismissed from service effective February 3, 1971.

"2. That the carrier be ordered to compensate L. D. Foust for all time lost for all regular assigned work days, reinstating him to service with all seniority and vacation rights, and all other benefits due under current agreements."

Do you want me to keep reading?

Q. Yes, please.

A. "The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

"The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act as [69] approved June 21, 1934.

"This division of the Adjustment Board has justification over the dispute involved herein.

"Parties to said dispute waived right of appearance at hearing thereon.

"It is recognized that Rule 23 and Rule 24 of the Agreement are both very pertinent and would be given great probity and value, and be carefully examined. It is also recognized that a substantial question exists on the merits of this matter.

"The occurrence on which the claim is based is determination of services by the carrier, which termination was mailed to Mr. Foust, the claimant, on February 3, 1971.

"The grievance and claim was filed by Mr. D. F. Jones, District Chairman on April 9, 1971, by the employee's—" I can't make that out for sure.

Q. Submission.

A. —"submission, and on appeal"—excuse me—"and on April 6 by the carrier's submission."

And then I can't read that next line. Something as of the carrier.

Q. Would that be the line, "We shall take the most favorable date to the claimant, and use the date of April 6"? Would this one be easier for you to read? Go ahead and take a look at that.

[70] A. Okay. Right.

"We shall take the most favorable date to the claimant, and use the date of April 6, 1971, as the carrier's answer on April 13th, as shown by the record, refers to the letter of April 6th, 1971."

Q. Would you go on with it if there is more?

A. "By taking the dates most favorable to the claimant, sixty-two days passed between the occurrence and the filing of the grievance and claim.

"Rule 21-(1) says:

"All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the carrier authorized to receive same, within sixty days from the date of the occurrence on which the claim is based."

"These agreements are carefully entered into and it is the intent of both parties to see that there are no dilatory tactics. It is the same principle as a non-claim statute in Probate law, and the Statute of Limitations in law. In the absence of fraud or lack of jurisdiction, it is absolute.

"Certainly, the possibility of injustice is not a defense to this limitation.

"The purpose of this part of Rule 21 is to insure rapid handling of claims.

[71] "This claim and grievance was not filed and presented in writing by or on behalf of the employee involved, to the officer of the carrier authorized to receive same, within sixty days from the date of the occurrence on which the claim was based.



"Award.

"Claim denied.

"National Railroad Adjustment Board, by order of Second Division."

And then it is signed by the Executive Secretary, I think it is Killner.

Q. Mr. Foust, is there a third page to that exhibit?

A. And this date is at the end, "Dated at Chicago, Illinois, this 2nd day of June, 1972."

Q. Is there a third page to that?

A. Yes, there is.

Q. Would you read that to the jury, please?

A. "National Railroad Adjustment Board, Second Division.

"Order.

"To accompany Award No. 6296, Docket 6171.

"Mr. James E. Yost, President, Railway Employees Department, A. F. of L.-C. I. O., 220 South State Street, Chicago, Illinois.

[72] "The Division, after consideration of the docket identified above, hereby orders that an award favorable to the petitioner should not be made. The claim is denied as set forth in the award, a copy of which is attached and made a part of this order.

"National Railway Adjustment Board, by order of Second Division."

Signed by Killeen.

Q. All right.

Mr. Foust, as a result of any activity by the IBEW, were you ever reinstated to your employment with the Union Pacific Railroad?

A. No, I was not.

Q. Did there come a time, Mr. Foust, when you terminated any right you might have had to be reemployed by the railroad?

A. Yes, at a later date I did.

Q. When was that?

A. September 25, 1973.

Q. What was the purpose of that?

A. It finally came to a place that I had to make some kind of settlement because I had no representation left by the Union. My attorney checked out all avenues and made all phone calls and wrote every possible letter he could do, and due to no place to go, I finally decided that a settlement [73] should be reached.

Q. So as a part of your settlement with the railroad, you made that agreement to waive any further right to reemployment with the railroad?

A. Yes.

Q. Was the IBEW a party to that agreement?

A. No.

\* \* \*

[74] Q. Mr. Foust, based upon those computations, are you able to tell me what it is, the amount of money you would have earned based on those salaries as an employee of the railroad during the period of February 8, 1971, to September 25, 1973?

A. It has a total here of \$30,836.40.

Q. Mr. Foust, I notice you are examining a document. What is that document?

A. This is a document presented to my attorneys by [75] the Union Pacific Railroad.

Q. At your request?

A. At my request.

\* \* \*

[76] A. Oh, yes, there was several. I had insurance policies, I had hospitalization insurance with the Railroad Hospital Association, and I had a family policy with my family with Travelers. It covered those.

I had pass rights for traveling on the railroad and things of this nature that I also lost.

Q. Now in relation to your insurance, did your insurance terminate at a given time?

A. When they terminated my service, yes.

Q. And as a result of your lack of insurance, did you incur medical expenses?

A. Oh, yes. During this span of time here, my wife entered the hospital with a heart attack and the bills surmounted past a thousand dollars on just this one occurrence alone.

Q. And you had no insurance to cover that?

A. No.

[77] Q. Mr. Foust, had you to your knowledge done everything requested of you by anyone in regard to your leave of absence in employment with the Union Pacific Railroad?

A. Yes, I did.

Q. Is there anything you are aware of you could have done that you did not do to comply with the need for a leave of absence with the Union Pacific Railroad?

A. No. I instructed my attorney to check out every avenue and everything like this. He called everybody that he could possibly find and they gave him the final word that this was the final thing that they could do.

Q. Now in relation to prior to February 3 of 1971, prior to your termination, had you done everything the Union Pacific Railroad had requested of you?

A. Yes.

Q. Is there anything to your knowledge that you could have done in addition to what you did do in order to obtain a leave of absence?

A. No. I complied with everything they wanted and required, time limit and everything like this.

MR. MACKEY: All right.

Your Honor, at this time—I believe that these exhibits were received into evidence at the Pre-Trial, but for the purposes of the record—and I don't mean to cause some confusion—I would like to offer at this time [78] Plaintiff's Exhibits 14, 15, 16, 17 and 10.

And in addition I would like to offer as Plaintiff's Exhibits, since they are not yet before the jury, Defendants' Exhibits A, B, C, D and Y into evidence. All of those are matters that have been dealt with at the Pre-Trial Conference.

THE COURT: Do you agree, Mr. Hickey?

MR. HICKEY: Yes, I do.

THE COURT: Very well. Each of those exhibits may be received.

(Plaintiff's Exhibits 10, 14, 15, 16 and 17 and Defendants' Exhibits A, B, C, D and Y were received in evidence.)

MR. MACKEY: Thank you, Your Honor, very much. I have no further questions. You may inquire, counsel.

#### CROSS-EXAMINATION

BY MR. HICKEY:

Q. Mr. Foust, you testified that as a result of the accident you incurred in your employment with the Union Pacific you had medical treatment?

A. Yes, sir.

. . . .

[88] Q (By Mr. Hickey) Let's strike the word "compensation." Did you receive some money because you were off, disabled and sick?

A. Yes.

Q. How much did that amount to?

[89] A. Oh, the exact figure I can't give you, but roughly about \$250 a month.

. . . .

[90] Are you contending that the Defendant Union or any of its representatives entered into and had any part

with the decision of Union Pacific to terminate you for violation of its rules?

A. I do not know this. I do not know for sure.

Q. Are you contending that they had?

A. No.

Q. Now is it a factual statement that you will agree with that first you retained counsel in the fall of 1970 to handle your case as concerned the personal injuries you had incurred as a result of this accident and thereafter throughout the whole course of the history of this problem and that you instructed them to do everything to represent your interests?

A. Yes. I obtained my attorney to handle my claim for my injury with the railroad. At the same time I asked them if they would, due to my incapacibilities at this time, due to myelograms and headaches and all different problems, if they would write letters to the Union for me as I asked them to and take care of any other personal matters that came up because I was afraid that the strain around my house with my wife would come to a bad end, which it eventually did.

\* \* \*

[101] MR. UCHNER: 14.

MR. MACKEY: 14. Here it is, Your Honor, laying in front of Mr. Hickey at this time.

Let the record reflect the return request receipt, the document in question, is signed by Barbara Jones showing date delivered 3-27-71.

\* \* \*

[102] Q. (By Mr. Hickey) Let's get back right around from the time you were injured March 9, 1970, to February 3, '71. Did you have occasion to work with Mr. Jones at that time?

A. What were the dates again?

\* \* \*

[103] A. To the best of my recollection, no, I did not work with him then. He was in Rawlins and I was in Cheyenne.

\* \* \*

Q. Was he an employee of Union Pacific?

A. Yes, he was an equipment man.

Q. What is an equipment man?

A. He's the person that works with the Communication Department in just about every phase and capacity: Microwave, radio, telephone, telegraph. Basically this is the same thing as a radio man, only he is a higher scale than I am.

Q. He had a higher scale?

A. Yes.

Q. Did he work the same number of hours?

A. That would be pretty hard to determine because some of us put in some very long hours.

Q. Was the regular work schedule week the same?

A. Yes, it was basically that, yes.

Q. Do you know if he held a position with the Union [104] at the Union Pacific—not with the Union Pacific, but with the Brotherhood?

A. Yes. He was District Chairman.

\* \* \*

Q. (By Mr. Hickey) Do you know at what location Mr. Jones worked?

[105] A. He lived and his headquarters was at Rawlins and he was like practically every other person in the Union Pacific, had a certain district or territory to take care of.

Q. Would you know what your district was?

A. Yes. I knew what my district was.

Q. And what was your district?

A. Oh, it went to microwave sites as far as Chappell, Nebraska. I trouble shot Buckhorn Mountain which is up above Fort Collins. I trouble shoot Pilot Knob which is on the hill between here and Laramie.



Of course, other times I've ended up on different places as far as Brady, Nebraska, but that was not my assigned territory. These others were.

Q. What are the distances between the extremes of your area of work?

A. Oh, from here to Chappell approximately 125 miles, I believe. Thirty-five, forth miles up to Pilot Knob and Buckhorn Mountain would be somewhere between fifty and seventy-five miles, I imagine.

Q. Is that the area of a usual district for a communication worker?

MR. MACKEY: I object to that on the grounds it's absolutely irrelevant. It was Mr. Foust's territory. Whether it is usual, unusual or in between is neither here nor there to this case.

[106] THE COURT: What do you perceive the probative value to be?

MR. HICKEY: If it was, I'm attempting to lay the foundation if he knew at what points of work Mr. Jones would have engaged in his duties and whether it was the same district or similarly constructed district.

MR. MACKEY: I would object to the matter offered to be proved on the grounds it certainly is not the best evidence to bring in through Mr. Foust. Defendant Jones is absent from the courtroom and I have no idea whether he intends to be here or not.

THE COURT: Sustained. It is completely immaterial.

\* \* \*

[107] Q. (By Mr. Hickey) Looking at the days between the date of receipt of this letter and the date that the grievance was filed, the 6th, you so testified, of April, how many days in there would have constituted part of your normal work week?

A. Well, in our department it would really be hard to say on a normal work week. I mean, you never know whether you are going to be called out on a Saturday or

Sunday or whether you will be in your headquarters and everything like this.

Q. Now you testified that Mr. Jones' headquarters were Rawlins; is that right?

A. But you say the normal work week. Was this your [108] question?

Q. I said, how many days would constitute days of your normal work week? That was the question.

A. Well, there would be three days in March, the last three days of March, and first two days in April.

Q. That is five days, right?

A. Five days, yes.

Q. When was the time in which you had to file this grievance?

A. Sixty days.

Q. Sixty days. And the Union missed by two?

A. Yes.

Q. Do you have occasion at any time between shortly after April 3 when you first brought this termination letter to your attorneys' attention to handle for you and when they returned to you after March 26 and showed you the letter that they wrote to Jones, did you have occasion to ask them what they were doing for you?

A. Did I have occasion to ask my attorneys this?

Q. Yes.

A. Most of the time I instructed them what to do.

Q. Did you ask them had they filed a claim or taken any action to file a claim?

A. Yes.

Q. What did they say?

[109] A. And at that particular time they thought this was some type of error that could be cleared up with a simple matter of a letter to Mr. C. O. Jett, Superintendent of Communications, and I informed him of more or less what type of person he was, which was a little disbelief to him, and when they found this out to be accu-

rate and everything, and I told them to go to the Union and they did so.

\* \* \*

[110] Q. (By Mr. Hickey) Then I asked you, did you inquire of them what they were doing and you answered that they wrote this letter to Mr. Jett. This is after February 3. And I have told you as you have that exhibit in front of you, it's dated February 11; is that correct?

A. This particular letter after the discharge, yes.

Q. Now after that letter and between that date and March 26, did you again ask them what they were doing?

A. Well, I was in communications all the time with my attorneys. I don't exactly know what your question is, what it is leading to.

\* \* \*

[120] Q. During the period February 5, 1971, Mr. Foust, to April 5, 6, 7, 1971, did you ever personally communicate with Mr. Jones? Personally communicate, did you, during that [121] period?

A. What was your first date?

Q. February 5, 1971, the date you received your discharge letter.

A. No.

Q. You did not?

A. No.

Q. Did you ever communicate with Mr. Wisniski?

A. No.

Q. Did you ever communicate with any representative of the Union?

A. No. I had my attorneys do this.

Q. You had your attorneys do that?

A. Yes.

Q. Now do you know Mr. Wisniski and have you ever met him?

A. Yes.

Q. And what was the nature of your association with him or at what time?

A. You mean when I met the gentleman?

Q. Yes.

A. The first time I met him was when he was going through Cheyenne on a passenger train.

Q. What year would that be? Well, 1970, '71, '72?

A. Well, it was before this, before 1970.

[122] Q. Any time before that?

A. No.

Q. You just happened to meet him?

A. This one particular time I met him.

Q. Were you introduced to him?

A. Yes. Then I met him on another occasion also.

Q. You did meet him on another occasion?

A. Yes. I attended a local Union meeting here and he sat in on that meeting.

Q. Do you know what meeting that was, when it was? Was it in this period?

A. No. It was before 1970.

Q. Then you knew what his job was?

A. Yes.

Q. What was that?

A. He was General Chairman.

Q. Do you know what they do as General Chairman?

A. They are supposed to represent us in their Union capacity.

Q. At certain levels of your grievance handling?

A. Yes.

Q. And in connection with the negotiation of contracts; is that correct?

A. I believe this is correct.

Q. Now was there any enmity or bad relations [123] between you and Mr. Wisniski?

A. No, I couldn't really say this. At times I felt we could have been a little better represented, but this is just my opinion.

Q. Was that at about this time?

A. Oh, I felt this at different times.

Q. Different times?

A. Yes. Uh-huh.

Q. Did it have anything to do with you personally?

A. No. It was just things that we encountered working and if we would bring up any of this for discussion or anything like this, we would sort of get brushed aside and passed over like this.

Q. If so, that would have affected you and a number of your other co-workers; is that correct?

A. This is correct.

Q. Not you personally?

A. No.

Q. Was there any unpleasant relationship or association at any time with Mr. Jones?

A. No. As far as Union matters go and things like this, no, I don't think there was.

Q. Do you know of any reason why they would want to do you harm for any reason whatsoever?

A. No, I can't truthfully say that there was.

\* \* \*

[125] Q. (By Mr. Hickey) Do you know what the Union did that you had a basis to complain about or did not do?

A. That the Union?

Q. Yes.

A. They didn't represent me properly.

Q. Can you explain that for us in how you feel they did not represent you properly?

A. Well, in this one ruling here they ruled two days after the sixtieth day limit so the Union was two days late.

Q. All right, sir. Now so they filed your claim two days late. Anything else?

A. Well, due to that I was terminated so that just about covers everything.

Q. Is that your conclusion that due to that you were terminated?

A. Yes. I had no recourse.

Q. Did the Union even though two days late file a claim as you wanted it to do?

A. Yes, two days late they did file a claim.

Q. Did they undertake by their representative to [126] process that through every step of the appellate procedure with all the offices available on the Union Pacific?

A. Yes.

Q. Did they then take to final and binding arbitration before the Second Division of the Railroad Adjustment Board?

A. Did they what?

Q. Take it to arbitration before the Second Division of the Railroad Adjustment Board?

A. Yes. I believe this is right through the steps they followed.

Q. And then we can agree, can we not, that they filed it two days late and their efforts were unsuccessful; is that correct?

A. Yes.

Q. Is that the nature of what you think they did or didn't do?

A. That is what all the evidence shows they did.

\* \* \*

[143] (The deposition of Robert Walker Taylor, M. D., was read into evidence.)

\* \* \*

[146] (Pages 1 through 23, Line 20, of the Deposition of Dean F. Jones were read into evidence.)

\* \* \*



[151] EDWARD P. MORIARITY,

called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MACKEY:

Q. Would you state your full name for the record, please.

A. Edward P. Moriarity.

Q. And your occupation, Mr. Moriarity?

A. I'm a lawyer.

Q. How long have you been an attorney?

A. About five and a half years.

\* \* \*

[154] MR. MACKEY: No, sir. This is a letter of November 19, 1970, from Mr. Moriarity to Mr. Jones.

MR. UCHNER: We have no objection, Your Honor.

THE COURT: It may be received.

(Plaintiff's Exhibit No. 25 received in evidence.)

Q. (By Mr. Mackey) Mr. Moriarity, would you please read to the jury—

MR. MACKEY: Well, Your Honor, because Mr. Moriarity is having trouble with his voice, perhaps it would be more appropriate if I read it to the jury.

THE COURT: You may read it to the jury.

[155] MR. MACKEY: Thank you.

Ladies and gentlemen, this is Plaintiff's Exhibit No. 25 which Mr. Moriarity just testified is a letter of November 19, 1970, addressed to—

"Mr. D. F. Jones

"514 12th Street

"Rawlins, Wyoming 82301

"Re: LeRoy Foust, International Brotherhood of Electrical Workers

"Dear Mr. Jones:

"Mr. LeRoy Foust has retained our firm to represent him concerning an accident which occurred on or about March 9, 1970, while he was on duty with the Union Pacific Railroad as a radioman in the Communications Department.

"On June 17, 1970, Mr. Foust sent a letter to you regarding a claim for grievance against the carrier. Since we will be handling all facets of this accident for Mr. Foust, it would be appreciated if you would address all further correspondence and contracts regarding the above matter to this office.

"At the present time it would be appreciated if you would please give this office a status report as to what is being done regarding this grievance. It is Mr. Foust's understanding that this grievance has been forwarded on to Mr. Leo J. Wisniski, General Chairman of IBEW, in Omaha, [156] Nebraska. I am taking the liberty of sending a carbon copy of this letter to Mr. Wisniski to give him notice that we are representing Mr. Foust. We would appreciate hearing from you or Mr. Wisniski regarding the above grievance. Thank you for your cooperation in this matter.

"Very truly yours, McClintock, Mai & Urbigkit, by, Edward P. Moriarity."

Showing a copy to Mr. Leo J. Wisniski.

Q. (By Mr. Mackey) Mr. Moriarity, did there come a time when you received a response to that letter?

A. No, I did not. They never did reply to any of the letters that we wrote to them.

\* \* \*

[157] Q. (By Mr. Mackey) Mr. Moriarity, I hand you what has been marked for identification as Plaintiff's Exhibit No. 26. Can you identify that letter?

A. Yes. This is the letter to Mr. Jones written by me on behalf of Mr. Foust dated January 11, 1971, regarding the first grievance.

Q. All right. Mr. Moriarity, I hand you what has been marked for identification as Plaintiff's Exhibit No. 27 and ask if you can identify that?

A. Yes. This is a letter dated January 21st, 1971, to Mr. Jones with reference to the letters of November 19th and the letter of January 11th for which we had never received any reply.

Q. Those were prepared under your direction?

A. They were.

MR. MACKEY: Your Honor, at this time the Plaintiff would offer Plaintiff's Exhibits 26 and 27 into evidence.

MR. HICKEY: No objection, Your Honor.

THE COURT: They may be received.

(Plaintiff's Exhibits 26 and 27 received in evidence.)

Q. (By Mr. Mackey) Mr. Moriarity, what is the subject matter of these two letters, if you know, or take a look at them and tell the jury, please.

[158] A. Well, the letter of January 11th dealt with a telephone conversation that Mr. Jones had with Mr. Foust based on some information Mr. Wisniski had given Mr. Jones. And we had written to Mr. Jones and asked him for a copy of the letter from Mr. Wisniski so that we could get the matter straightened up.

Q. Was this in relation to a particular problem Mr. Foust was having with the Union?

A. Yes. As I recall, some time prior to the time that Mr. Foust had retained us, he had been off work to go through some physical therapy, I think it was. It's been some time ago. And he was not paid for the time that he was off work. He turned in a grievance.

Q. To whom did he turn in a grievance?

A. He turned in a grievance to the Union according to the manual of the Union to handle it in that procedure rather than go through Court or anything of that nature. There is a substantial difference between a grievance and a claim.

Q. Does the letter of January 21st or Plaintiff's Exhibit 27 relate to the same subject?

A. The letter of January 21st relates basically to the same subject matter. It was a longer letter wherein we just asked why they weren't replying to our correspondence and why they weren't doing anything on behalf of Mr. Foust.

[159] Q. There is nothing in relation to these two exhibits that would bear any question about the Union's representation of Mr. Foust in relation to his discharge; is there?

A. No. This is the first grievance that he had.

MR. MACKEY: Your Honor, with leave of the Court I would like to read these two exhibits to the jury, if I might.

THE COURT: Very well.

There is no objection to Mr. Mackey doing it instead of the witness?

MR. HICKEY: No, Your Honor.

MR. UCHNER: No.

THE COURT: Very well.

MR. MACKEY: Plaintiff's Exhibit 26 ladies and gentlemen of the jury is a letter of January 11, 1971, addressed to Mr. D. F. Jones at 514 12th Street, Rawlins, Wyoming 82301.

"RE: LeRoy Foust (International Brotherhood of Electrical Workers)

"Dear Mr. Jones:

"Mr. LeRoy Foust, has informed me that he had a telephone conversation with you on December 8, 1970, regarding his grievance against the carrier. He stated

that you informed him that it was the Union's position that since he had retained [160] an attorney, the Union was not going to have anything else to do with this matter. The information you gave Mr. Foust came to you by letter from Mr. Leo J. Wisniski, General Chairman of IBEW in Omaha, Nebraska.

"Further, Mr. Foust stated that you agreed to send him a copy of the letter that you received from Mr. Wisniski. Mr. Foust, has yet to receive a copy of this correspondence and would appreciate it if you could please send a copy of that letter to us at your earliest convenience.

"Very truly yours, McClintock, Mai, Urbigkit & Moriarity, by, Edward P. Moriarity."

Then Plaintiff's Exhibit No. 27 which is a letter dated January 21, 1971, to Mr. D. F. Jones, 514 12th Street, Rawlins, Wyoming 82301.

"RE: LeRoy Foust (International Brotherhood of Electrical Workers).

"Dear Mr. Jones:

"On November 19, 1970, and again on January 11, 1971, I wrote to you on behalf of the above-named Union member. To this date I have not received a reply from you concerning my correspondence.

"On June 17, 1970, Mr. Foust, according to the procedure laid down in Rule 21 of the Agreement between the U.P.R.R. and the IBEW, effective April 1, 1957, reported a grievance against the carrier for not complying with Rule 7, [161] Paragraph A, of said Agreement. He outlined the basis for this grievance in his letter reporting same.

"According to Mr. Foust, he was informed by you via telephone on December 8, 1970, that the Union was not going to assist him in prosecuting this grievance since he had chosen to retain independent counsel. You stated that you received this information by letter from Mr. Leo J. Wisniski, General Chairman of IBEW in Omaha,

Nebraska. Mr. Foust requested a copy of this letter and although you said that you would send him one, he has yet to receive a copy of this correspondence.

"It is the position of our client that he has been more than fair with the Union and has attempted to comply with all of their requirements. He has not received any cooperation in any matter from the Union and would appreciate knowing the reasons why.

"There is a distinction in the rules between a grievance and a claim. Mr. Foust has retained this law firm to represent him in his claim against the carrier for a personal injury which he sustained while on the job. He has also exercised his right under the Agreement to have the Union represent him in his grievance against the carrier. These are two separate and distinct items and the fact that we represent Mr. Foust in prosecuting his claim should have no bearing whatsoever on his request to have the Union represent him in prosecuting the grievance. The only possible overlap [162] lapping of these two separate and distinct items is the fact that Mr. Foust is entitled to full pay under Rule 7 because he was injured on the job and is not away from the job on his own accord.

"Mr. Foust has been in the past, and still remains a very strong Union man. He has always looked towards his Union for security and backing. It would sincerely be appreciated if you would please give us your views on the above-mentioned matters so that we can, hopefully, arrive at an amicable way of settling this dispute.

"If we do not receive an acknowledgement of this letter within ten days we will be forced to take the position that the Union has chosen to deny Mr. Foust his well deserved representation and we will have no alternative but to take whatever further steps are necessary to compel the Union to abide by their contract.

"Very truly yours, Edward P. Moriarity."



Q. (By Mr. Mackey) Mr. Moriarity, did there come a time when you became aware of the fact that Mr. Foust had been discharged by the Union Pacific Railroad?

A. Yes.

Q. When was that?

A. I'm not sure the exact date. I know that Mr. Foust brought a letter into the office from a Mr. C. O. Jett of the Union Pacific Railroad saying that he [163] had been discharged. The exact date that he brought it in, I don't know for sure. Some time soon after he received it though.

\* \* \*

[168] THE WITNESS: Well, as a result of receiving that letter and discussions with my client, I wrote to [169] Mr. C. O. Jett, the Superintendent of Communications of the Union Pacific Railroad, on February 11, 1971, in which I set forth all of the facts of the case and asked him if he would reconsider the firing of Mr. Foust.

Q. (By Mr. Mackey) Did you ever receive a reply to that letter from Mr. Jett?

A. I don't think so. You know, I haven't looked at the files in a long time, but I just don't ever recall receiving a letter from Mr. Jett.

I recall some time later we waited and kept hoping for a reply and we never got any. I finally called Mr. Jett and Mr. Jett said that, well, they just hadn't had a chance to look at it and that he thought it was going to be final, but he would let me know. And he never let me know and I kept waiting and waiting.

Finally I called him and it was because I was worried; the Rule says something about sixty days that the grievance has to be filed. So, I called Mr. Jett and Mr. Jett informed me that the only avenue that we would have to handle that matter was through the Union representative and he informed me that the Union representative would be Mr. Jones in this area and to write to him and he could file a grievance on Mr. Foust's behalf.

As a result of that conversation with Mr. Jett, I did that.

\* \* \*

[170] A. Yes. This is a letter dated March 26, 1971, to Mr. D. F. Jones and in there I said:

"Dear Mr. Jones:

"We have been informed that you are the officer of the carrier authorized to receive grievances under Rule 21 of the Agreement . . ."

I had been informed of that fact by Mr. Jett and I'm sure that I talked to him that same day or the day before getting a final reply from him that there wasn't anything that Union Pacific was going to do to reconsider.

\* \* \*

[182] (Continued reading of the deposition of Dean F. Jones [183] beginning on page 23, line 21, to the jury.)

MR. MACKEY: At this time Plaintiff would offer into evidence as Plaintiff's Exhibit 23 the deposition exhibits attached to the deposition of Mr. Jones.

Excuse me, Your Honor, that would be Exhibit No. 24, I believe.

THE COURT: Any objection, Mr. Hickey?

MR. HICKEY: No objection, Your Honor.

MR. MACKEY: I would like to point out to the Court again some of the similar problems we have had. There are duplications in these. It seems easier at this point to leave them in tact, recognizing that there are duplications.

THE COURT: Very well.

\* \* \*

[187] (The deposition of Leo Wisniski was read to the jury during which time the lunch recess was taken from 12:00 o'clock noon to 1:30 p.m., May 14, 1976.)

THE COURT: Mr. Mackey, the exhibits of the deposition of Mr. Jones and Mr. Wisniski should both be marked

as the next exhibits. For purposes of the record they will not be received as exhibits, but they will be marked.

MR. MACKEY: Your Honor, I believe we have offered into evidence the exhibits from Mr. Jones' deposition as Plaintiff's Exhibit 24 which were received in evidence.

THE COURT: Right.

MR. MACKEY: And the deposition, as I understand it, was marked also as an exhibit but not offered or received. I don't know exactly what that number is.

THE COURT: It was Plaintiff's Exhibit 25.

MR. MACKEY: 25. So, at this time, Your Honor, I believe that the Court Reporter has marked Mr. Wisniski's deposition. If not, we would ask it be marked in the sequential series of numbers and then I believe that would be Exhibit 28 and then Plaintiff's would offer the exhibits of the Wisniski [188] deposition as a group identified as Plaintiff's Exhibit No. 29 consisting of seventeen documents which were discussed by number and the two letters which the closing colloquy related to, letters from Mr. Wisniski's file, Your Honor. I have them right here if I can have a moment to locate them.

(Brief pause.)

Yes, Your Honor, pursuant to our agreement with Mr. Hickey, those twenty-two letters were provided and I would add them to that group of exhibits which I believe is now Plaintiff's Exhibit No. 29 and offer them at this time as that exhibit.

THE COURT: Any objection?

MR. HICKEY: No objection.

THE COURT: It may be received.

(Plaintiff's Exhibit No. 29 received in evidence.)

\* \* \*

[192] MR. HICKEY: I'm sorry, Your Honor.

I at this time make a motion pursuant to Rule 50 for a directed verdict on the basis that the Plaintiff

has failed to establish a prima facie case entitling him to release, [relief].

\* \* \*

[204] THE COURT: The Court will take the Defendants' Motion for a Directed Verdict under advisement and reserve ruling.

\* \* \*

[205] LEROY D. FOUST,

called as a witness on behalf of the Defendants, being first duly sworn, testified as follows:

#### DIRECT EXAMINATION

BY MR. HICKEY:

\* \* \*

[207] Q. (By Mr. Hickey) Mr. Foust, I think we were at the point where I asked you what the monthly amount of that disability annuity was.

A. At the present day, you mean?

Q. Yes.

A. I believe it is \$351.95 a month.

Q. Each month?

A. Yes.

\* \* \*

[208] MR. MACKEY: Your Honor, let the record reflect that in the Answers to Interrogatories signed by Mr. Foust is a series of questions, one of which is "State the effective date of the initial payment of any annuity to you and the amount thereof."

The answer is "Physical disability, May 2, 1971, [209] to present."

\* \* \*

Q. (By Mr. Hickey) When you sought that annuity, did you file an application with the Railroad Retirement Board?

A. Yes.

Q. Did you state that you were physically disabled from performing the work of your job?

A. Yes.

\* \* \*

[211] Q. You are not working?

A. No.

Q. Or earning any money now?

A. No.

Q. Why is that?

A. Well, there are very few jobs I can handle.

Q. You said in the second Interrogatory, Mr. Foust, when I asked you what your damages were based on, the Answer as it was based on the wages you lost during the period from your discharge to the date that you executed that release and waived further employment with the Union Pacific of September 25, 1973; is that correct?

A. Did you say April 3, '71, to September 25, '73? Yes, this is right.

\* \* \*

[226] MR. MACKEY: Your Honor, we haven't pleaded damages beyond September 25, 1973.

MR. HICKEY: I didn't bring this in.

MR. MACKEY: You brought it in.

THE COURT: That's true, you did in your Pre-Trial Statement say that you are claiming no damages beyond that date in 1973.

MR. MACKEY: Right.

THE COURT: I have had the feeling though in the course of this trial that you were claiming more than that.

MR. MACKEY: We have claimed mental anguish, pain and suffering and the like, Your Honor, but we do not expect compensation, nor will I argue to the jury that

we are [227] entitled to compensation beyond that date. That has always been my position.

\* \* \*

[232] MR. UCHNER: If the Court please, at this time, Your Honor, all the evidence in the case having been closed, the Defendants will renew their Motion for a Directed Verdict pursuant to the Rule.

THE COURT: Upon previous grounds?

MR. UCHNER: Based upon the previous grounds and for the previous reasons that this case should be decided as a matter of law and it would certainly be impossible to submit it to the jury.

THE COURT: Mr. Mackey?

MR. MACKEY: Well, Your Honor, I would resist Mr. Uchner's Motion for, I think he said, Directed Verdict and would in fact move for a directed verdict on behalf of the Plaintiff on the question of the breach of duty of the Union on the grounds that the Union has presented no evidence showing any reasonable excuse for their failures; the failures are clear and undisputed; and would ask not only that the Defendants' Motion be denied—and I haven't responded to the particular points therein, Your Honor, that were raised the [233] first time—but would ask in fact that the Court direct a verdict in favor of the Plaintiff and submit it to the jury on the question of what damages we might be entitled to as a result of it.

THE COURT: You wish to respond to the Plaintiff's Motion?

MR. HICKEY: No, Your Honor.

THE COURT: Gentlemen, the Court feels in this case that there is a basis, admittedly not the strongest one could ever imagine, but there is in my judgment a basis on which under the instructions that I'm going to give in this case where the jury might possibly find that the actions of the Defendants were arbitrary or capricious. And on that basis, I'm going to let the case go to the jury.



(The Court reviewed proposed instructions with counsel.) (Trial proceedings recessed 4:10 p.m. and reconvened 4:15 p.m., May 14, 1976, and the following proceedings were had in the presence and hearing of the jury:)

\* \* \* \*

[234] MR. MACKEY: \* \* \*

\* \* \* \*

[241] Then I want to talk to you about punitive damages. The Judge will tell you later on in his instructions what the measure of those are. He will tell you some other things like the burden of proof which is mine, ours, Mr. Foust's, beyond a preponderance of the evidence; the case wherein the evidence must be more logically on the side of Mr. Foust than against him.

In the event that that is true, and it is, then you must find in favor of Mr. Foust and assess the damages. Those burdens are ours and we recognize it and one of those burdens we have is to show if we are entitled to punitive damages, and we are; that the Union acted in a wanton manner. The Union acted in such a way as to hostilely discriminate against Mr. Foust or members of that class. And I'm telling you that Mr. Foust is a member of a very interesting class of people. He is a member of the International Brotherhood of Electrical Workers. And if the [242] International Brotherhood of Electrical Workers displays to you this disdain and does not appear here to defend, why should they have any more respect for their membership? If the Union Pacific hires out of the IBEW those people like Mr. Jones who is now in management and moved up and over and just, you know, is getting along fine now with the railroad, if that's the system and that system operates under the circumstances that this Union has operated, that Mr. Foust is not only entitled to punitive damages, he is entitled to every penny of the punitive damages we have asked to tell that Union that

they will not disdainfully reject their members, do as they please and then try to cover it up. Because that's not proper and a little judgment in this case won't make a bit of difference to that large Union that covers the entire Union Pacific System and its members are System Federal No. 105 that signed for six different crafts and all of these people who work along the system and who pay their dues into that Union. Mr. Foust did for seventeen years every month pay his dues into that system and then when the time came to rely on them, he couldn't rely on them.

If that is the attitude of that Union toward their members, then you give us punitive damages in the amount of \$75,000 which we have prayed for. We are not only entitled to it, but it is specifically to punish the Union, to tell them that this kind of conduct in relation to their members [243] will no longer be tolerated.

And anything else than that will not do it. A little judgment in this case will not do it. We have to have the Union sort of tapped on the shoulder to say "Pay attention to your members" and you as members of the jury are the only ones here who can do that. And I ask you to do that, not on behalf of Mr. Foust, but on behalf of those people who suffer from that attitude that the Union has displayed in this courtroom and that the Union has displayed in its conduct of two grievances for Mr. Foust.

Now, if you have the question "What is it the Union did?" I'm going to ask you to wade through those exhibits again. I'm going to tell you that my view of them is it is easiest for you to look at the two series of exhibits offered from the deposition of Mr. Jones and Mr. Wisniski who displayed that attitude, that disdain for their membership, that failure to act in a timely manner, when talk is so easy. Instead of typing those letters in Omaha, Nebraska, and sending them to Mr. Foust saying "Forget it, Mr. Foust, we don't recognize your attorney, we don't



know who he is, we don't know he exists;" which was not true because Mr. Wisniski and Mr. Jones both told you it was not true.

Wouldn't it have been just as easy to have prepared a request for a continuance if that was necessary [244] or to have simply sent that letter dated April 6, April 8, April 9? Fortunately—no, it is not fortunate because the results is the same in any event, but at least the Railroad Board of Adjustments said "We're going to take the date most favorable to Mr. Foust and that's April 6." There is a lot of evidence that that grievance was not filed on April 6 but was in fact filed at some later time and those dates were altered and changed by Mr. Jones to make it look as best it could for the Union.

Did he miscalculate? I don't know. I hope he calculated better than Mr. Wisniski did during his deposition because he didn't know and wouldn't count and didn't bother to count and didn't want to count. And we dragged it out of him finally to sit down and add them up one, two, three, four, five. And that's another manifestation of the attitude.

So, ladies and gentlemen of the jury, I am going to leave you with this thought: I have the opportunity of rebuttal and I will use it because I have the burden of proof. But I am going to leave you with this thought: You six people are the only people in this courtroom who can tell that Union that their conduct will not be acceptable under the circumstances they displayed in this case. Therefore, I want you to go in the jury room, I want you to deliberate on this and I want you to come back with a full measure. Please don't give us half a measure; give us a full [245] measure. We want what we ask for in this case because that's the only way that the jury can tell the Union that they are not going to tolerate this kind of conduct.

Thank you very much.

\* \* \*

[258] THE COURT: \* \* \*

Members of the jury: The time has come for the Court to instruct you as to the law applicable to this case.

First I must state that indispensable as are the final arguments of counsel, nonetheless they cannot be considered as evidence.

The evidence likewise offered at the trial and rejected by the Court or stricken from the record by order of the Court should not be considered by you, nor should the opening statements of counsel or the remarks of the Court [259] or the remarks of counsel in the course of the trial. All of these are not evidence and none of these should be considered by you in arriving at your verdict.

Also the Court did not by any words uttered during the course of the trial and the Court does not by these instructions give or intimate or wish to be understood by you as giving or intimating any opinions as to what has or has not been proven in this case, nor as to what are or are not the facts of the case. And no single one of these instructions states all of the law applicable to the case, but all of these instructions must be considered together as they are connected with and relate to each other as a whole.

You are instructed that the Plaintiff has brought this action against the Defendant International Brotherhood of Electrical Workers, the Union of which the Plaintiff was a member, and the Individual Defendants Jones, Wisniski and Gladney as officers of that Union, claiming damages for breach of a statutory duty to fairly represent the Plaintiff as a member of the bargaining unit and for breach of the agreement between the Plaintiff and the Defendant Union to represent the Plaintiff fairly in connection with a grievance procedure which was occasioned by the alleged wrongful discharge of the Plaintiff by the Union Pacific Railroad.

The Plaintiff contends that his employer wrongfully discharged him on February 3, 1971, for the reason that he [260] had allegedly failed to file for a leave of absence, when in fact he had applied for such a leave. And that pursuant to Rule 21 of the Agreement of the Defendant Union with the Union Pacific Railroad Company, a Notice of Grievance was required to be filed within sixty days of the date that the grievance occurred. The Plaintiff contends that he requested the proper Union official to file the grievance but that Union official failed and refused to file it within the sixty-day period and that the grievance was consequently denied on the grounds that it was not timely filed.

The Plaintiff claims \$75,000 actual damages and punitive damages in the amount of \$75,000.

The Defendants have denied the allegations of the Plaintiff that they were guilty of gross non-feasance and hostile discrimination in arbitrarily and capriciously refusing to process the Plaintiff's grievance, and refusing to file it timely, and further content that the Plaintiff has been compensated by a private settlement with the Union Pacific Railroad Company for the alleged wrongful termination of his employment.

Thus, the issues that you are to determine in this action are these: First, whether or not the Plaintiff was a member of a Defendant Union; second, whether or not the Defendant Union under its labor agreement was obliged to represent the Plaintiff at grievance procedures with the [261] Union Pacific Railroad Company; third, whether or not the Defendants breached an agreement with the Plaintiff and a duty to represent him fairly in grievance procedures; fourth, whether or not the Defendants were guilty of gross non-feasance and hostile discrimination in arbitrarily and capriciously failing to process the Plaintiff's grievance; fifth, whether or not the Plaintiff was damaged by the action of the Defendants; and sixth,

whether or not the Plaintiff is entitled to punitive damages.

Now, under our system of Civil Jurisprudence, it devolves upon the Plaintiff, the party who brings the action, to prove the material allegations of his complaint by what is known as a preponderance of the evidence. This is not a technical definition of the term "preponderance of the evidence" but it simply means that the evidence produced or offered on behalf of the Plaintiff must weigh a little more than the evidence offered in opposition to the claim.

By "preponderance" is not meant the number of witnesses but is meant the weight and the credit to be given to their respective testimony.

If you find that the evidence offered on both sides is of equal weight, then the Plaintiff cannot recover because under those circumstances he has failed to sustain the burden of proof which the law imposes upon him.

There are generally speaking two types of evidence [262] from which the jury may properly find the truth as to the facts of a case. One is direct evidence such as the testimony of an eye witness. The other is indirect or circumstantial evidence, the proof of a chain of circumstances pointing to the existence or non-existence of certain facts. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires the jury to find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

Now, during the trial of this case certain testimony was read to you by way of deposition consisting of sworn written answers to questions asked of the witness in advance of the trial by one or more of the attorneys for the parties to the case. The testimony of a witness who for some reason cannot be present to testify from the witness stand may be presented in writing, under oath in the form of a deposition and such testimony is entitled to the same consideration and is to be judged as to

credibility and weighed and otherwise considered by the jury insofar as possible in the same way as if the witness had been present and had testified from the witness stand.

You are instructed to ignore any evidence relating to whether or not the Plaintiff was wrongfully discharged from employment by the Union Pacific Railroad Company. The Defendant Union and its representatives did not participate [263] in any aspect of that decision and there is no charge in the Complaint involving the Union in regard to whether or not the Plaintiff had or had not observed the rules of the carrier which were stated as a basis for the termination of his employment by the railroad.

You are also instructed that a claim by a former Union member against a Union for breach of its duty of fair representation is a separate and distinct claim which the member has and is apart from any right which the employee may have or may have had against his employer. Thus, if you find from a preponderance of the evidence that the actions of the Union have caused damage to the Plaintiff independent of any actions which the employer may have taken, you may award such damages as the evidence shows the Plaintiff incurred.

You must first determine whether the Union and its officers had a duty to represent the Plaintiff, fairly and efficiently, in a grievance proceeding. If there was that duty, then you must decide whether the Union and its officers failed to perform that duty. If they performed that duty, you shall return a verdict of no cause of action. If they failed to perform that duty, you shall return a verdict for the Plaintiff.

You are further instructed that the Plaintiff must show more than that the Union did not press his grievance. [264] You must find by a preponderance of the evidence that the Union in failing to process the grievance acted arbitrarily, capriciously or in bad faith. However, you are also instructed that a Union may not arbitrarily

ignore a meritorious grievance or process it in a perfunctory manner.

You are instructed that the term "arbitrary and capricious" are synonymous and refer to an act done without an adequate principle or an act not done according to reason and judgment. Whether an act is arbitrary or capricious must be judged on the basis of whether the act complained of is reasonable or unreasonable under the circumstances.

You are instructed that the term "bad faith" implies a breach of faith or a willful failure to respond to plain and well understood obligations.

If you find that the Defendant failed to perform a duty owed to the Plaintiff, then you must determine the amount of damages sustained by the Plaintiff as a result of that breach of duty. The measure of damages to be considered by you includes all of the salary and wages, overtime pay, vacation pay, insurance, seniority and fringe benefits which the Plaintiff would have received during the period he would have been working for the railroad company.

In addition to actual damages, the law permits the jury, under certain circumstances, to award the injured person punitive and exemplary damages, in order to punish the wrong [265] doer for some extraordinary misconduct, and to serve as an example or warning to others not to engage in such conduct.

If the jury should find from a preponderance of the evidence in the case that the Plaintiff is entitled to a verdict for actual or compensatory damages; and should further find that the act or omission of the Defendants, which proximately caused actual injury or damage to the Plaintiff, was maliciously, or wantonly, or oppressively done; then the jury may, if in the exercise of discretion they unanimously choose so to do, add to the award of actual damages such amount as the jury shall unanimously agree to be proper, as punitive and exemplary damages.



Now, an act or failure to act is "maliciously" done, if prompted or accompanied by ill will, or spite, or grudge, either toward the injured person individually, or toward all persons in one or more groups or categories of which the injured person is a member.

An act or a failure to act is "wantonly" done, if done in reckless or callous disregard of, or in difference to, the rights of one or more persons, including the injured person.

An act or a failure to act is "oppressively" done, if done in a way or manner which injures, or damages, or otherwise violates the rights of another person with unnecessary harshness or severity, as by misuse or abuse of [266] authority or power, or by taking advantage of some weakness, or disability, or misfortune of another person.

Whether or not to make any award of punitive and exemplary damages, in addition to actual damages, is a matter exclusively within the province of the jury, if the jury should unanimously find, from a preponderance of the evidence in the case, that the Defendants' act or omission, which proximately caused actual damage to the Plaintiff, was maliciously or wantonly or oppressively done; but the jury should always bear in mind that such extraordinary damages may be allowed only if the jury should first unanimously award the Plaintiff a verdict for actual or compensatory damages; and the jury should also bear in mind, not only the conditions under which, and the purpose for which, the law permits an award of punitive and exemplary damages to be made, but also the requirement of the law that the amount of such extraordinary damages, when awarded, must be fixed with calm discretion and sound reason, and must never be either awarded, or fixed in amount, because of any sympathy, or bias, or prejudice with respect to any part to the case.

You are further instructed that Rule 21 entitled "Discipline and Grievances" reads in part as follows: "(1) All claims or grievances must be presented in writing by or on behalf of the employee involved to the officer of the [267] carrier authorized to receive same within sixty days from the date of the occurrence on which the claim or grievance is based."

In other words, the grievance need not be presented only by the employee, but may be presented by some other person such as his personal attorney acting on behalf of the employee or by the Union.

Upon retiring to the jury room, you will select one of your number to act as a foreman or forewoman. The foreman or forewoman will preside over your deliberations and will be your spokesman in Court.

The Court will provide you with two verdict forms which have been prepared for your convenience. The first verdict form reads:

"We, the jury in the above-entitled action, unanimously find in favor of the Plaintiff, LeRoy Foust, and against the Defendants, International Brotherhood of Electrical Workers, et al., and assess the Plaintiff's actual or compensatory damages in the sum of \$" blank line. And if you are going to sign the verdict form by unanimous agreement, then you would fill in the amount which you believe the Plaintiff would be fairly entitled.

It continues: "In addition to the actual damages awarded above, we, the jury unanimously award the Plaintiff, LeRoy Foust, punitive and exemplary damages in the [268] sum of \$" blank line "against the Defendants International Brotherhood of Electrical Workers, et al."

If you decided that punitive damages were proper in this case under the rules that I have just read you, then you could fill in that blank line and then date it and the foremen or forewoman would sign the verdict.

The other form of verdict reads:



"We, the jury duly empanelled in the above-entitled action and upon the issues joined do find generally for the Defendants and against the Plaintiff."

I think that's self-explanatory and there is a place to fill in the date and sign it. And this is the form that you will use in the event that the jury were to unanimously find against the Plaintiff and for the Defendants in the case.

When you have reached unanimous agreement as to your verdict, the foreman or forewoman will fill in the date and sign the verdict form and then return to the courtroom with the completed form.

If it becomes necessary during your deliberations to communicate with the Court, you may send a note by the Bailiff, but bear in mind you are not to reveal to the Court or to any other person who the jury stands numerically or otherwise on the question before you until after you have reached a unanimous verdict.

[269] You may take the exhibits with you into the jury room; that is, all of the exhibits that have been received in evidence except the three depositions.

With that, ladies and gentlemen of the jury, I will ask you to retire for a moment while we consider any possible suggestions or objections that counsel may have to these instructions.

\* \* \*

[270] MR. UCHNER: If the Court please, the Defendant would take exception to the instruction which the Court gave on punitive damages. We believe that it is error to give such an instruction because the evidence in this case as reflected in the record does not justify such an instruction. There is no testimony in this record pertaining to bad faith or arbitrary, capricious acts, the necessary elements for punitive damages.

The only way in which the jury could return such an award would be based upon speculation, conjecture or passion.

Under the law of this Court and based on the Tenth Circuit and also I believe contained in a memorandum brief which Mr. Hickey submitted at the time that we filed the Motion for Summary Judgment, there are many other authorities stating that it has to be a clear showing in the record. We sincerely believe it is error to give such an instruction to the jury on this element of damage.

\* \* \*

[271] MR. HICKEY: As you know, we did comment that my understanding of the law is that in denial of fair representation cases, punitive damages are not a proper element. I should therefore say we add that as a reason why no instruction on punitive damages should have been given or that they should not consider punitive damages and an instruction of that type should have been given.

\* \* \*

THE COURT: Very well. The Court will leave the instruction as given.

\* \* \*

[272] Members of the jury, you will harken unto your verdict.

"We, the jury in the above-entitled action, unanimously find in favor of the Plaintiff( LeRoy Foust, and against the Defendants, International Brotherhood of Electrical Workers, et al., and assess the Plaintiff's actual or compensatory damages in the sum of \$40,000.

[273] "In addition to the actual damages awarded above, we, the jury, unanimously award the Plaintiff, LeRoy Foust, punitive and exemplary damages in the sum of \$75,000, against the Defendants, International Brotherhood of Electric Workers, et al."

Members of the jury, was this and is this your verdict?

(Affirmative response.)

\* \* \*

[275] (Trial proceedings adjourned 8:40 p.m., May 14, 1976.)

## PLAINTIFF'S EXHIBIT 29

System Federation #105  
Room 308 Kane Bldg.  
P.O. Box 1631  
Pocatello, Idaho

Date April 17, 1968

Re: Handling Grievances with Carriers  
and progressing same to National  
Railroad Adjustment Board.

Circular:

To all Local Chairmen  
Union Pacific Railroad  
Portland Terminal Railroad

Dear Sirs and Brothers:

This letter is intended to bring to your attention the importance of proper preparation of claims and Grievances and to supplement the information contained in the booklet entitled "Guide for Handling of Grievances with Carriers."

You have from time to time received information from this office relating to this subject and because of our experienceing some difficulty with cases when progressing with management and preparing for handling with the adjustment Board we find many times that pertinent information of facts and evidence in support of claims is not in the record.

Local Chairmen should bear in mind the fact that every claim or grievance is a potential Board case and should be prepared as such. We list below some very important things that must be in your original claim when presented in writing to the officer of the Carrier (Master

Mechanic and or Superintendent in case of Open shops) designated to handle such matters which must be made within the time limits as set out in the agreement of August 21, 1954.

(1) When a claim or grievance is given to the Local Chairman to handle he should investigate the matter thoroughly to determine if a violation did take place and if so he should gather all pertinent *facts and evidence to support these facts* so he can present same in support of his claim.

(2) In presenting this written claim or grievance the record should state (a) The name of claimant, his location and assignment, classification, and availability. (b) The time, date and place of violation (c) The type of work performed by whom, and on what equipment. (Engine, car numbers, machinery etc.) (d) The amount of time claimed and (e) The agreement rules which were violated.

We again reemphasize that all of the above is very important and particularly, that you must be able to support your claims with documented evidence such as witnesses statements, pictures, or statements from employes on how the rules have been applied etc.

Where conferences with Local Shop Foreman or General Foreman are held in accordance with rule 35 a brief memorandum should be kept in the record to show an attempt was made to adjust the matter with them and what the results of the conference were.

We sincerely hope this letter will be of some help to you in your preparation of future claims or grievances and with best wishes we remain.

Fraternally yours,

/s/ C. S. Poole  
C. S. POOLE, President  
System Federation #105

/s/ H. F. Parkin  
H. F. PARKIN  
Secretary-Treasurer  
System Federation #105

# DEFENDANTS' EXHIBIT S

No. C 74-50 Civil  
Defendants' Exhibit 19  
9-66-8M

Form 222

UNION PACIFIC RAILROAD COMPANY

Draft No. 11228-WLW

## RELEASE OF ALL CLAIMS

In consideration of the payment to me of the sum of Seventy-Five Thousand Dollars (\$75,000.00#) by Union Pacific Railroad Company (Less \$2,682.98 sickness benefits received under Railroad Unemployment Insurance Act) receipt whereof is hereby acknowledged, I do hereby release and discharge Union Pacific Railroad Company and all other parties whomsoever, from any and all claims and liability of every kind or nature, INCLUDING CLAIMS FOR INJURIES, IF ANY, WHICH ARE UNKNOWN TO ME AT THE PRESENT TIME, arising out of an accident on or about March 9th, 1970, at or near Speer, Wyoming, resulting in injuries to my person, which, as I claim, have totally and permanently disabled me from ever performing the duties of my employment; and in consideration of the amount provided to be paid me by the terms of this agreement, receipt of which is hereby acknowledged, I hereby waive any possible right of future employment. I also waive any claim for alleged wrongful discharge against Union Pacific Railroad Company and its employees or former employees.

The above payment is made and accepted in compromise settlement of disputed claims and is not an admission of liability.

No promise of future employment, or other promise of any kind, has been made to me in connection with this settlement.

I have read the above and understand it is a full release of all my claims.

Signed at Cheyenne, Wyoming this 25th day of September, 1973.

/s/ Leroy D. Foust  
 LEROY D. FOUST  
 Cheyenne, Wyo.  
 Sept. 25, 1973.

Witnesses:

/s/ [Illegible] 9/25/73

/s/ [Illegible] 9/25/73

/s/ [Illegible] 9/25/73

I hereby acknowledge receipt of a copy of this release today Sept. 25, 1973.

/s/ Leroy D. Foust

# DEFENDANTS' EXHIBIT Z

Cheyenne, Wyoming

September 25, 1973

Mr. R. H. Brenneman  
 Superintendent of Communications  
 Union Pacific Railroad Company  
 Omaha, Nebraska

Dear Mr. Brenneman:

Please accept this as my resignation from the employ of Union Pacific Railroad Company, effective February 3, 1971.

Very Truly Yours,

/s/ Leroy D. Foust  
 LEROY D. FOUST  
 Sept. 25, 1973



UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF WYOMING

No. C 74-50

\_\_\_\_\_  
LEROY FOUST,  
\_\_\_\_\_  
Plaintiff,  
—vs—

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS;  
D. F. JONES, District Chairman in his Representative  
Capacity; LEO WISINSKI, General Chairman in his  
representative capacity; and FRANK T. GLADNEY, In-  
ternational Vice President in his representative capacity,  
Defendants.

DEPOSITION UPON ORAL EXAMINATION  
OF DEAN F. JONES

9:30 o'clock a.m.

October 3, 1975

Umatilla County Courthouse  
Pendleton, Oregon

[4] Q Mr. Jones, would you state your name please.

A Dean F. Jones.

Q Where do you live, sir?

A 930 Madrona Avenue, Hermiston, Oregon.

[5] Q What's your occupation?

A Assistant manager, communications facilities, Un-  
ion Pacific.

Q For a certain division?

A Not necessarily.

Q You are stationed out of Hermiston, Oregon?

A Yes. I am stationed in Hermiston.

[8] Q Directing your attention to the period 1970, '71,  
at that time did you hold any position as an officer or  
representative of the International Brotherhood or of the  
local of the IBEW?

A I did. District chairman.

Q Would you tell me whether district chairman is a  
position with the local or with the International?

A With the International.

[9] Q And what is the area of your assigned responsi-  
bilities as district chairman?

A The area would be the eastern district of the Union  
Pacific.

Q So that responsibility would encompass more than  
the local of which you were a member?

A Correct.

Q That's district chairman?

A District chairman.

\* \* \* \*

Q Would you describe to me the responsibilities of dis-  
trict chairman?

A Filing and handling of claims and grievances of  
men in the craft.

Q Were there other persons of a like position for the  
same geographical area with your local?

A No.

Q You were the only district chairman for the men  
[10] that were in your particular territory; is that cor-  
rect?

A Yes.

\* \* \* \*

[46] Q And that contact was after you had received  
the letter of March 26th, Deposition Exhibit 9, and before  
you mailed Number 10; is that correct?

A I believe it was.

Q With whom was that contact?

A With Mr. Wisinski.

Q Would you state to me what you said to him and what he said to you? First by what medium if you know, sir?

A I think I called Mr. Wisinski on the phone.

\* \* \*

Q Do you have any recollection at all of the subject matter?

A I think we talked about this letter here from Mr. Moriarity or whatever his name is, yes. I think we talked about this letter.

Q Based upon that discussion, then, was a decision made that Mr. Moriarity's letter would not be accepted as a [47] request to file a grievance?

A I believe it was.

Q Who made that decision?

A Well, I guess I did.

Q Upon whose direction?

A I can't say.

Q Well, to go back, if Exhibit 10 was typed by Mr. Wisinski or through his office, did you tell him what to put in that letter that you were then going to sign?

A I don't know whether I did or not.

Q Would you state whether it was Mr. Wisinski or you that first raised the question of refusing to accept the request because it came from Mr. Moriarity rather than personal signature of Mr. Foust?

A I don't know which one of us raised the question.

Q Had you ever raised such a question at any time prior thereto in your exercise of responsibility in behalf of the union?

\* \* \*

[49] Q Would you tell me at this time whether or not you knew that rule 21 had a 60 day time limitation for filing a grievance?

A Yes.

Q Will you state whether or not that fact was known to you on or after March 26, 1971 and before April 5th, 1971?

A Yes. It was well known.

Q Would you state whether or not you took it into consideration when you discussed the matter with Mr. Wisinski and when you sent the letter back to Mr. Moriarity?

A I am quite sure that it had been taken into consideration. Whether it was or not, I don't know, but I am sure that it should have been.

Q But was it?

A I can't say whether it was or not. I am sure that it would have been.

Q You say you are sure it would have been?

A Yes.

Q What was the last date that the grievance could be filed?

A I don't have that right in front of me here. I would have to look.

Q You are aware of the fact, are you not, that when the grievance was filed, that it wasn't timely?

[50] A I feel it was probably untimely, yes.

Q Are you aware of the fact that it was not untimely when you received the letter which is marked as Deposition Exhibit 9?

A It appears to not have been untimely. I don't know when I received this letter, when I first got home to see it.

Q Would you state to me, sir, as you recall, whether or not you discussed the date of incident which was the subject matter of Mr. Moriarity's letter, Deposition Exhibit 9, with Mr. Wisinski in this contact sometime before April 5th, 1971?

A I could not tell you. It has been so long I don't remember.

Q Would you state whether or not in accordance with your recollection whether there was any discussion about the 60 day limitation and when it might fall?

A I don't know.

Q Would you tell me whether or not you gave any consideration to telephoning Mr. Foust and advising him that you were rejecting his request or rejecting this request to file a grievance?

A No.

Q At this time, then, you are simply not able to say whether you took into account the question of the 60 day [51] limitation. And the response that you made which is dated April 5th?

A I don't know whether it was taken into consideration or not.

Q Directing your attention, then, to Exhibit 10, would you tell me wherein you obtained the information, if you obtained it yourself, that it was necessary to receive in writing authority to process the claim or grievance, and directing your attention to the second paragraph of the exhibit?

A I don't know where I received the information.

Q Can you state whether or not there is any such requirement in rule 21?

A At this time, without reading rule 21, I don't know.

Q I will hand you the contract and it probably would be better to have it marked.

(Plaintiff's Deposition Exhibit Number 17 was marked for identification.)

THE WITNESS: It is in rule number 21.

Q (BY MR. URBIGKIT:) Okay. Would you state to me the language?

A The language?

Q Yes.

A All claims or grievances must be presented in [52] writing by or on behalf of the employee involved to the officer of the carrier authorized to receive same within 60 days from the date.

Q Would you state to me how that relates to your requirement that the request to file the grievance by you

meant that it could not either be in behalf of the employee. . .

A I don't believe I understand the question there.

Q You had received a request in writing on behalf of the employee that you file a grievance, had you not, by Exhibit Number 9?

A Yes.

Q And that request was in writing?

A Right.

Q The request from an attorney from whom you had received three prior letters at least with reference to his representation of Mr. Foust?

A Right.

Q Would you then explain to me what provision of the rule caused you to refuse to accept that written request in behalf of the employee as your basis for representing a member of your union in filing the grievance?

A Which letter are we referring to, sir?

Q This letter here.

A Oh. I don't know.

Q Isn't it a possible fact that you didn't type [53] Exhibit Number 10 as well as several of these other exhibits but rather that it was typed and mailed to you for you to sign, date and mail?

A That's possible.

Q And then isn't it a probable fact, not a possible fact, but probable fact that the decision which is reflected there in Exhibit 10 was not made by you but rather was made by whoever prepared the letter, typed it and mailed it to you to sign?

A I wouldn't know whether it was or not.

Q Well, do you know that you made the decision?

A No. I don't know that I did or that I did not.

Q And you don't know whether you made the decision in consideration of the fact that the limitation of 60 day time limit was or had by that time expired?

A No.



Q Directing your attention to Exhibit Number 15, again I believe you testified previously, have you not, that you don't know whether you typed that document?

A No, but I probably didn't. I imagine it was probably typed by Wisinski and signed by me.

Q There is a "never" inserted in the letter in ink. Would you state whether or not that was inserted by you?

A I think it was.

Q You examined the letter and found out that it did [54] not reflect what you wanted and that word was inserted?

A Apparently so.

Q Do you recall specifically?

A No, I don't.

\* \* \* \*

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF WYOMING

No. C 74-50 Civil

\_\_\_\_\_  
LEROY FOUST,

*Plaintiff,*

—vs—

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS;  
D. F. JONES, District Chairman in his representative capacity; LEO WISNISKI, General Chairman in his representative capacity; and FRANK T. GLADNEY, International Vice President in his representative capacity,  
*Defendants.*

DEPOSITION OF LEO WISNISKI

210 Sunset Park  
1860 Larimer Street  
Denver, Colorado

February 23, 1976

APPEARANCES:

TERRY W. MACKEY, Esq.,  
For the Plaintiff.

WILLIAM J. HICKEY, Esq.,  
For Defendant I.B.E.W., and  
Leo Wisniski.

The deposition of LEO WISNISKI, produced, sworn and examined upon his oath on the 23rd day of February, 1976, at 1:30 o'clock p.m., at 210 Sunset Park, 1860

Larimer Street, [2] Denver, Colorado, before me Nancy Newton Fuller, a Certified Shorthand Reporter, a Notary Public within and for the City and County of Denver, State of Colorado, pursuant to Notice and the Federal Rules of Civil Procedure, for the examination of the said LEO WISNISKI, a defendant called for examination by the plaintiff herein, in a certain suit and matter in controversy now pending and undetermined in the said District Court, being No. C74-50 Civil.

\* \* \*

[4] EXAMINATION

BY MR. MACKEY:

Q Would you state your full name?

A Leo Wisniski.

\* \* \*

[5] Q What is your present address, Mr. Wisniski?

A 5636 Spring Street, Omaha, Nebraska.

Q How long have you resided there?

A Twelve years.

Q What's your present occupation?

A International Representative 10th District, International Brotherhood of Electrical Workers.

Q And how long have you been so employed?

A November 1st, 1974.

Q Prior to November 1st, 1974 did you also work for the I.B.E.W.?

A I was General Chairman Systems Council No. 3.

Q How long did you occupy that—

A Twelve years.

Q You are going to have to let me finish the question.

[6] MR. HICKEY: Leo, excuse me just a second. This very pleasant young lady has a job and she can't hear two voices.

Q (By Mr. Mackey) How long were you employed as General Council—or what was the position that you had?

A General Chairman.

Q How long were you employed at that?

A Twelve years.

Q During the period 1970 and '71 you were so employed as General Chairman?

A Correct.

Q Now, would you describe for me briefly what the duties of General Chairman are?

A General Chairman handles all and settles all claims and grievances after they have been handled on the local level, and the final handling with the Carrier prior to submitting to National Railroad Adjustment Board.

Q Would you describe please what you mean by handling the claims; what steps you take to handle those claims?

A It would be the steps after a District Chairman had filed a claim under the terms of the agreement, and when he is rejected the claim and the file is sent to the General Chairman for the final handling with the Carrier.

\* \* \*

[7] Q All right. Mr. Wisniski, what is your educational background?

A High school and then electrical school at Westinghouse, and the service.

\* \* \*

[29] Q When did it first come to your attention that Mr. Foust had a claim or grievance against the Carrier in writing?

That's not very artfully phrased.

When did it first come to your attention in writing that Mr. Foust had a claim or grievance against the Carrier?

[30] A I don't know of any claim.

Q Would your file reflect whether or not you ever became aware of the fact that Mr. Foust had a claim against the Carrier?

A You mean an injury claim?

Q No, grievance?

A A grievance. Well, after he was removed from service, yes.

Q When was that?

A Well, like I said, I thought he got removed on February 4th.

Q Would your file reflect when you first became aware of Mr. Foust's claim—or grievance, excuse me?

A I believe that I—yes, February the 5th is when I found out about it.

\* \* \*

[35] You have had an opportunity to examine Plaintiff's Exhibit No. 10?

A Yes.

Q Do you know where that letter was typed?

A Oh, I don't know; I may have typed it for him at his request, but I don't know whether that's the exact one, whether [36] he retyped it or not, I don't know.

Q All right. Would you look at Plaintiff's Exhibit No. 10(a), which is the next document down, and please compare Exhibit 10 to Exhibit 10(a)?

A Yes.

Q Do they appear to be the same?

A Have I got the right one?

Q Yes.

Do they appear to be the same?

A Well, whether they're the same or not I don't know. The letter is the same.

Q My question is do they appear to be the same?

A You got me.

Q In fact the lines, if you will look at the first line of the letter Exhibit 10(a), it ends in the word "received", does it not?

A Yes.

Q And the line in the Exhibit 10—the first line—ends in the word "received".

In fact, the text of these two letters are exactly identical; isn't it?

A Well, it could be.

Q Would you look at them and please read them and tell me whether or not they are?

A Well, they could very well be.

[37] Q Read them, sir, and—

A I have read them.

Q All right. Is the text identical then?

A They appear to be.

Q All right. Now, the only difference that I note is the difference of a handwritten date of April 5, 1971 and the signature D. F. Jones appearing on Plaintiff's Exhibit No. 10.

A That's right.

Q Otherwise Plaintiff's Exhibit No. 10(a)—which is also marked Defendant's Exhibit 8 and U.S. District Court Wyoming Defendant's Exhibit H—that appears to be the only difference in those two letters?

A Yes.

Q Isn't it a fact, sir, that the letter dated April 5, 1971 and signed by D.F. Jones was prepared in your office?

A Yes; I told you that.

Q And you sent—

A By request of him; but I sent it to Jones, yes.

Q And Mr. Jones sent it to Mr. Foust?

A Yes, I assume he did.

Q And Plaintiff's Exhibit 10(a) is a copy of a letter taken from your files, isn't it?

A Boy, I don't know whose file it is.



Q Would you look in your file and see if you have a copy of a letter that appears to be identical or similar to [38] Plaintiff's Exhibit 10(a)?

A No, I haven't got everything here, so I —

Q Now, going back to Exhibit No. 9, the letter of March 26, 1971; do you know when that letter came to your attention?

A Of what?

Q The letter of March 26th, 1971.

A I can't recall whether he called me about it, I don't know, about the letter coming. I think he may have called me.

Q Do you remember when—

A No, I would have no idea.

Q Do you remember when, in relation to the time that you received a copy of Plaintiff's No. 9?

A No, I do not.

Q After you received notice of the facts in Plaintiff's Exhibit No. 9 and the call from Mr. Jones, what did you do? Did you then cause Plaintiff's Exhibit 10 and 10(a) to be prepared?

A He requested it of me.

Q By telephone?

A Yes. Ordinarily it wouldn't be done, but he requested that. I told him what he had to do, so then he said, "Well, would you type them out". So, I typed them out just on plain paper for him. I never even kept a copy of it.

Q Is that an unusual procedure?

[39] A That is unusual, yes.

\* \* \*

[42] Q Would you look at the bottom of page 1, the last paragraph on page 1 of that letter?

Now, it states, "Pursuant to Rule 21 Mr. Foust is making this written report of his grievance claim and hereby requesting the International Brotherhood of Elec-

trical Workers to do everything within their power to enable Mr. Foust to be re-enstated as an employee without any loss of wages or loss of seniority."

Now, have you read that?

A I have read that.

Q And you agree that that's in Plaintiff's Exhibit No. 9.

A I see that Mr. Edward P. Moriarity wrote this letter and not Mr. Foust.

Q And that is on behalf of Mr. Foust?

A He didn't notify us of that fact.

Q I see; and so your position was that this was not a claim or a request in writing?

A No, it was not. In my position it was not.

\* \* \*

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF WYOMING

No. C 74-50B

\_\_\_\_\_  
LEROY FOUST,

*Plaintiff,*

—vs—

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS;  
D. F. JONES, District Chairman in his representative  
capacity; LEO WISINSKI, General Chairman in his  
representative capacity; and FRANK T. GLADNEY, In-  
ternational Vice President in his representative capacity,  
*Defendants.*

JUDGMENT ON JURY VERDICT

The above-entitled cause having come on for trial to the  
Court and a jury of six, and the issues having been duly  
tried, and the jury having rendered its verdict, NOW,  
THEREFORE, IT IS

ORDERED AND ADJUDGED that the plaintiff Leroy  
Foust recover of and from the defendants the sum of  
\$115,000.00, such amount constituting the jury award of  
\$40,000.00 actual or compensatory damages and \$75,000.00  
punitive or exemplary damages; it is

FURTHER ORDERED that the plaintiff have his costs  
of action expended herein, to be taxed by the Clerk.

Dated this 17th day of May, 1976.

/s/ [Illegible]  
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF WYOMING

No. C 74-50

\_\_\_\_\_  
LEROY FOUST,

*Plaintiff,*

—vs—

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS;  
D. F. JONES, District Chairman in his representative  
capacity; LEO WISINSKI, General Chairman in his  
representative capacity; and FRANK T. GLADNEY, In-  
ternational Vice President in his representative capacity,  
*Defendants.*

MOTION FOR JUDGMENT NOTWITHSTANDING THE  
VERDICT AND ALTERNATIVE MOTION  
FOR NEW TRIAL

COME NOW the Defendants, having moved for a  
directed verdict at every stage of the proceedings, which  
motions were denied, and based upon those grounds urged  
by Defendants on their Motions for Directed Verdict here-  
by move the Court to enter Judgment Notwithstanding  
The Verdict, pursuant to Rule 50(b) of the Federal Rules  
of Civil Procedure.

In the alternative, if the foregoing Motion is not  
granted, the Defendants, pursuant to Rule 59(a) of the  
Federal Rules of Civil Procedure, move that the verdict  
of the jury in the above-entitled cause be set aside and  
that the Judgment entered on the verdict be vacated and  
set aside and that a new trial be granted to Defendants  
for the following reasons:

1. The verdict is contrary to the law and the evidence.
2. The verdict pertaining to actual or compensatory damages is excessive and appears to have been given under the influence of passion and prejudice.
3. The verdict pertaining to actual or compensatory damages is based upon improper elements of damages which are too remote and speculative.
4. The verdict pertaining to punitive or exemplary damages is excessive, remote, speculative and based upon improper elements of damages. The evidence, as reflected in the record, and the applicable law did not warrant an award for exemplary or punitive damages and the Court erred in not so instructing the jury.
5. The evidence, as reflected in the record, was totally insufficient to sustain a verdict of liability upon the part of any of the Defendants herein.

WHEREFORE, Defendants pray:

- (a) That the within Motions be set down for hearing by the Court;
- (b) That the Court grant Defendants' Motion For Judgment Notwithstanding The Verdict.
- (c) In the alternative, if the foregoing Motion is not granted, that the Court set aside the Judgment entered on the verdict and grant a new trial.
- (d) In the alternative, if the foregoing Motions are not granted, that the Court set aside the Judgment entered on the verdict and grant a new trial solely on the issue of damages.
- (e) In the alternative to granting a new trial, that the Court make and issue an alternative order grant-

ing a new trial unless a Remittitur is filed by the Plaintiff.

DATED this 25th day of May, 1976.

MULHOLLAND, HICKEY & LYMAN  
Suite 400  
1125 - 15th Street N.W.  
Washington, D.C. 20005

LATHROP, UCHNER & MULLIKIN  
A Professional Corporation

By /s/ David D. Uchner  
DAVID D. UCHNER  
400 American National Bank  
Building  
Cheyenne, Wyoming 82001  
Attorneys for Defendants

#### CERTIFICATE OF SERVICE

A copy of the foregoing MOTION FOR JUDGEMENT NOTWITHSTANDING THE VERDICT AND ALTERNATIVE MOTION FOR NEW TRIAL was mailed, postage prepaid, addressed to Urbigkit, Halle, Mackey and Whitehead, Box 247, Cheyenne, Wyoming 82001, Attorneys for Plaintiff, on May 25th, 1976.

/s/ David D. Uchner  
DAVID D. UCHNER



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF WYOMING

No. C 74-50

\_\_\_\_\_  
LEROY FOUST,

—vs—

*Plaintiff,*

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS;  
D. F. JONES, District Chairman in his representative  
capacity; LEO WISINSKI, General Chairman in his  
representative capacity; and FRANK T. GLADNEY, In-  
ternational Vice President in his representative capacity,  
\_\_\_\_\_  
*Defendants.*

**ORDER DENYING DEFENDANTS' MOTIONS FOR  
JUDGMENT NOTWITHSTANDING THE VERDICT OR  
IN THE ALTERNATIVE FOR A NEW TRIAL**

The above-entitled matter having come on regularly  
before the Court upon the motions of the defendant for  
judgment notwithstanding the verdict or in the alternative  
for a new trial, the Court having heard the arguments  
of counsel in support thereof and in opposition thereto on  
July 14, 1976, having considered the brief of defendants  
and the authorities relied upon by plaintiff, having taken  
the matter under advisement, and being now fully advised  
in all the premises, it is therefore

ORDERED that the motions of the defendants for judg-  
ment notwithstanding the verdict or in the alternative for  
a new trial be, and the same hereby are, denied.

Dated this 23d day of July, 1976.

/s/ Clarence A. Brimmer  
United States District Judge

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF WYOMING

No. C 74-50-B

\_\_\_\_\_  
LEROY FOUST,

—vs—

*Plaintiff,*

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS:  
D. F. JONES, District Chairman in his representative  
capacity; LEO WISINSKI, General Chairman in his rep-  
resentative capacity; and FRANK T. GLADNEY, Inter-  
national Vice President in his representative capacity,  
\_\_\_\_\_  
*Defendants.*

**NOTICE OF APPEAL**

Notice is hereby given that the International Brother-  
hood of Electrical Workers: D. F. Jones, District Chair-  
man in his representative capacity; Leo Wisniski, Gen-  
eral Chairman in his representative capacity; and Frank  
T. Gladney, International Vice President in his represen-  
tative capacity, above named defendants, hereby appeal  
to the United States Court of Appeals for the Tenth Cir-

cuit from the final judgment entered in this action on the 17th day of May, 1976.

/s/ William J. Hickey  
EDWARD J. HICKEY, JR.  
WILLIAM J. HICKEY  
MULHOLLAND, HICKEY & LYMAN  
1125 - 15th Street, N.W., Suite 400  
Washington, D.C. 20005

DAVID D. UCHNER  
LATHROP, UCHNER & MULLIKIN  
American National Bank Building  
Cheyenne, Wyoming 82001  
Counsel for the Brotherhood

Of Counsel:

MULHOLLAND, HICKEY & LYMAN  
1125 - 15th Street, N.W.  
Suite 400  
Washington, D.C. 20005

LATHROP, UCHNER & MULLIKIN  
American National Bank Building  
Cheyenne, Wyoming 82001

Date August 18, 1976

U.S. COURT OF APPEALS  
TENTH CIRCUIT

MAY TERM—May 24, 1978

No. 76-1951

LEROY FOUST,  
*Plaintiff-Appellee,*  
vs.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS;  
D. F. JONES, District Chairman in his representative capacity; LEO WISNISKI, General Chairman in his representative capacity; and FRANK T. GLADNEY, International Vice President in his representative capacity,  
*Defendants-Appellants.*

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay and Honorable James K. Logan, Circuit Judges

This matter comes on for consideration of the petition for rehearing and suggestion for rehearing en banc filed by appellants in the captioned cause.

Upon consideration whereof, it is ordered:

1. The petition for rehearing is denied by Circuit Judges Holloway, Barrett and Doyle, who rendered the decision sought to be reheard.

2. No judge in regular active service or a judge who was a member of the panel that rendered the decision having requested a vote on the suggestion made by ap-

pellants, Rule 35, Federal Rules of Appellate Procedure,  
the suggestion for rehearing en banc is denied.

/s/ Howard K. Phillips  
HOWARD K. PHILLIPS  
Clerk

SUPREME COURT OF THE UNITED STATES

No. 78-38

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,  
*et al.*,

*Petitioners*

v.

LEROY FOUST

ORDER ALLOWING CERTIORARI

Filed October 10, 1978

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted, limited to Question 3 presented by the petition.